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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Carrie Ferrara Clark, )  
)  
Plaintiff, )  
) CV-14-2543-TUC-CKJ  
vs. )  
) Tucson, Arizona  
City of Tucson, ) February 4, 2019  
) 10:14 a.m.  
Defendant. )  
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
MOTIONS IN LIMINE

BEFORE: THE HONORABLE CINDY K. JORGENSEN  
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES

For the Plaintiff:

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For the Defendant:

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Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

1 P R O C E E D I N G S

2 (Proceedings commenced at 10:14 a.m., as follows:)

3 THE CLERK: CV-14-2543, United States -- I'm sorry,  
4 Clark vs. City of Tucson on, for a motion in limine hearing.  
5 Counsel, please state your appearances.

6 MR. JACOBSON: Good morning, your Honor. Jeffrey  
7 Jacobson on behalf of Carrie Clark who is present in the  
8 courtroom today.

9 THE COURT: Good morning.

10 MS. SAAVEDRA: Good morning, your Honor. Michelle  
11 Saavedra on behalf of the City of Tucson.

12 THE COURT: Good morning.

13 MS. WATERS: Renee Waters also on behalf of the City  
14 of Tucson.

15 THE COURT: Good morning. And this is the time --  
16 well, we're almost on time that the Court has set for a  
17 hearing, the parties' motions in limine. I have reviewed them  
18 and we'll give both sides obviously an opportunity to talk  
19 about them.

20 And I suggest we go issue by issue so there will  
21 be -- if you want to stay seated at counsel table you can, but  
22 just make sure you talk into these microphones so we can hear  
23 both sides.

24 So first one -- well, are there any preliminary  
25 matters that either side wants to talk about before we get

1 started on the motions in limine?

2 MR. JACOBSON: Not from the plaintiff, Judge.

3 MS. SAAVEDRA: None from us, your Honor.

4 THE COURT: Okay. And when is our trial date?

5 MR. JACOBSON: April 1st.

6 THE COURT: April 1st.

7 MR. JACOBSON: I think. Do you have that, Sandy?

8 THE CLERK: I do, yes.

9 THE COURT: April 1st. Okay. And just so I can  
10 know, how long do you think the case will take to try. Maybe  
11 you already told me.

12 MR. JACOBSON: I think it's set for eight days.

13 THE COURT: Eight days. Okay.

14 I will do -- normally a juror questionnaire, my  
15 practice is if the case is going to be lengthy, like two to  
16 three weeks, I'm not sure I would need a juror questionnaire  
17 just for the length of the trial. And it's not my practice,  
18 I'll tell you, normally to do a questionnaire. But given the  
19 issues in this case it might be appropriate, but let me hear  
20 first, Mr. Jacobson. I appreciate the briefing on the issue,  
21 particularly Judge Silver's article which I haven't read.

22 When did she write that?

23 MR. JACOBSON: It's been a while.

24 THE COURT: It's been a while. Anyway, so I've read  
25 those materials.

1           So Mr. Jacobson, do you want to be heard on your  
2 motion in limine, which is Document 154, which is a request  
3 for a written juror questionnaire in advance of voir dire.  
4 And again, there are two ways we can do this. If I decided to  
5 do a questionnaire, we could mail it out to the jurors,  
6 prospective panel members, and then get it back. Or we could  
7 do it the morning of and have jurors be down on the first  
8 floor, fill out the materials, answer some questions for us.  
9 Give both sides a chance to review it and then decide if we're  
10 going to excuse some people or ask some additional questions  
11 of certain people based on the responses we get that morning.  
12 So there's, you know, both of those models.

13           Or what my normal practice is, is to tell the panel  
14 right up front any sensitive issues they can come up to  
15 sidebar. I mean, we just hear all sorts of things up here at  
16 sidebar, and they can share it with the lawyers at sidebar,  
17 and then we'll move on from there. So that's another way to  
18 do it.

19           So Mr. Jacobson, go ahead.

20           MR. JACOBSON: Thank you, Judge. It's not my  
21 practice to regurgitate what I already put in the pleadings.

22           I will note that we did have this discussion during  
23 the status conference about a juror questionnaire. It is not  
24 a juror questionnaire that's proposed to be in lieu of voir  
25 dire. It's in addition to voir dire. I'm comfortable having

1 the veneer panel prepare it that morning; short 10 or 11  
2 questions. None of them really require a great deal of  
3 thought or preparation or research or anything like that. So  
4 I'm pretty comfortable with having the veneer panel do it in  
5 advance.

6 And I can address the motion to strike the  
7 defendant's response at this time because I did not file a  
8 reply in this case given the timing of this hearing.

9 THE COURT: All right. Go ahead.

10 MR. JACOBSON: So, Judge, what happened in this case  
11 was that we discussed the juror questionnaire during the  
12 status conference. I didn't believe, given that counsel was  
13 clear that I was going to be filing a proposed juror  
14 questionnaire, that I needed to meet and confer with the  
15 defense counsel, with them -- with defense counsel in advance  
16 to show them all of my questions. If I misunderstood the  
17 Court's intent regarding the juror questionnaire, it was  
18 inadvertent.

19 But the response misapprehends certain things. If  
20 the defense wanted to propose it's own juror questionnaire, it  
21 should have filed a motion in limine to do so. If it disputed  
22 some of the questions that I was proposing in my motion in  
23 limine, it should have done so in its response. Instead, what  
24 the response does is basically say, well, look, he didn't --  
25 he didn't file -- he didn't meet and confer with us so he's in

1 violation of that rule.

2 I note a couple of things about that argument.  
3 Rule 8(b)(1)(a) of the Rules of Civil Procedure state that in  
4 responding to a pleading, a party must state in short and  
5 plain terms its defenses to each claim asserted against it.  
6 Further, with very limited exceptions, a party is required to  
7 raise every defense in its first responsive pleading and the  
8 defenses not so raised are deemed waived. So if the defense  
9 really wanted to complain about the fact that I didn't meet  
10 and confer, it had an obligation to raise that in its  
11 response. And having failed to do so, it has now waived that  
12 argument. The defense ignored that claim, ignored that plain  
13 rule, and filed its own juror questionnaire which it  
14 characterizes as a prototype questionnaire. I don't know  
15 where that language came from.

16 But substantively, Judge, I outlined in my -- I  
17 outlined the fact that there were certain -- in my motion to  
18 strike, that the way they've characterized certain questions,  
19 we don't really have a problem with. Proposed Questions 3, 4,  
20 5, 6, 7, 8, and 10 are just rewording of the proposed juror  
21 questionnaire. That's fine. I outlined all that in my motion  
22 to strike. But I would ask that we be allowed to prepare a  
23 proposed juror questionnaire, that defendant's prototype  
24 questionnaire either be stricken or adopted per my motion to  
25 strike.

1           THE COURT: All right. I'm going to deny the motion  
2 to strike because I think it is helpful for me to hear,  
3 because this is an issue in dispute, whether to even have a  
4 questionnaire. I think it's helpful to hear from both sides  
5 what would be appropriate questions.

6           So let me just hear from Ms. Saavedra, Ms. Waters.

7           MS. WATERS: Yes, your Honor.

8           The City does not necessarily want a questionnaire;  
9 however, we don't oppose there being a questionnaire. Our  
10 position is, though, if there's going to be a questionnaire,  
11 it should be one that includes questions that have been agreed  
12 to by both sides. So the reason that we proposed a prototype  
13 questionnaire in our response was to be sure that if there's  
14 going to be one issued, it includes sensitive inquiries that  
15 might be important to us that plaintiff didn't include in her  
16 own.

17           Whether we add back in plaintiff's questions or  
18 reword some of the questions I think is all up for reasonable  
19 discussion. And I don't think it's beyond the capability of  
20 the parties to confer with one another and submit to the Court  
21 a jointly proposed questionnaire. If there are questions that  
22 we can't agree to, we can propose that separately for a  
23 ruling, but I think for the most part the parties are not --  
24 there's not a substantial dispute here.

25           And finally, your Honor, we put it in a

1 questionnaire format mostly for the ease of the Court and, I  
2 confess, only because my state court experience has been that  
3 judges there prefer that we submit a questionnaire that could  
4 actually be used rather than a list of questions. So if we  
5 overstepped by submitting a prototype questionnaire, I  
6 certainly apologize to the Court, but it was designed to make  
7 it easier to use and provide a format that we can adapt once  
8 we agree on the set questions.

9 THE COURT: Thank you. What do you think about the  
10 little summary of the background of case, Mr. Jacobson? If  
11 we're going to use the questionnaire, should we tell the jury  
12 a little bit about it? It's page 2. I don't know if you've  
13 had a chance to think about that.

14 MR. JACOBSON: I haven't had a chance, Judge, but I  
15 think in our joint pretrial order we had an agreed upon  
16 summary of the case.

17 THE COURT: Okay. Nature of the action. I'm trying  
18 to get a sense of -- I mean, breastfeeding is very common in  
19 our society. This isn't some strange, bizarre thing that  
20 we're asking the panel about. But do you think that  
21 realistically individual jurors are going to be really -- some  
22 of them or any of them are going to be really appalled at  
23 being asked a question of, If you have children -- If you're a  
24 woman, if you have children, did you breastfeed or not? Is  
25 that going to be something that's, like, How dare you ask me



1 that? It's none of your business. What's your sense,  
2 Mr. Jacobson?

3 To me, I see it both ways. What's the big deal?  
4 But on the other hand, maybe some people -- I mean, when  
5 you're asking somebody, they're in a very unfamiliar setting,  
6 in a courtroom. They could feel, perhaps, very uncomfortable.  
7 Obviously that's a very personal, private part of a person's  
8 life. It's very relevant. I'm sure both sides want to know  
9 if any individual juror actually breastfed, did not  
10 breastfeed. For example, if a woman didn't breastfeed, maybe  
11 she'll feel it's a stigma to not breastfeeding, and I  
12 shouldn't have to explain that and that's nobody's business.  
13 So I'm just trying to, in my own mind, figure out because I  
14 think it's relevant. I think both sides want to know this  
15 information. And want to know also if male jurors, their  
16 thoughts. If they're married or not and have children, what  
17 they think about this. I think it would be helpful for both  
18 sides.

19 So do you think it's something that's just so  
20 intrusive that we should have a questionnaire?

21 MR. JACOBSON: I do, Judge. And the jury consultant  
22 that we have was adamant that we should ask for the proposed  
23 jury questionnaire. The lawyers that I have spoken with that  
24 have tried other cases all suggested a juror questionnaire.  
25 Because, you know, unfortunately, as much as we want to

1 believe that this is an issue that society has finally just  
2 accepted, it's common, it's cool, everybody has moved on, I  
3 don't think that that is necessarily true of all generations.  
4 And I think there are still some stigmas, some attitudes  
5 around that I want to know about.

6 THE COURT: And what about, Ms. Waters, what do you  
7 think? The average juror, male or female, what do you think  
8 they're going to think about this line of questioning?

9 MS. WATERS: I guess my personal opinion is it's the  
10 lawyer's job to make the jury comfortable enough with the  
11 topic that they answer the questions honestly.

12 THE COURT: Maybe it's the judge's job.

13 MS. WATERS: Well, I think providing them the  
14 opportunity to have the sidebar helps create the atmosphere  
15 where they're comfortable to answer the questions. So my  
16 opinion is it's a necessary part of trying a case, it's a  
17 skill, and it's possible to do.

18 And in terms of breastfeeding, it's a sensitive  
19 issue but it's not -- it's not up in the realm of sexual  
20 assault or any number of other things that we have to ask  
21 jurors about. So is it likely to lead to some measure of  
22 awkwardness or people feeling like we're infringing on their  
23 personal decisions and life choices, of course; but I can't  
24 imagine what we ask them about that doesn't fall into that  
25 category. Which is why we said all along we can go either way

1 on the questionnaire. We don't think it's necessary, but we  
2 don't oppose it.

3 THE COURT: Let me take, for example, I'm looking at  
4 No. 5 on the City's perspective: If you have a baby, did you  
5 or your wife choose to use formula rather than breastfeeding.  
6 Say they say yes, would you want to know why?

7 MS. WATERS: I think then we follow up and ask why.  
8 So I don't believe the questions in the questionnaire  
9 alleviate the Court or the attorneys of the obligation to  
10 follow up on these answers because obviously there has to be  
11 some follow up.

12 THE COURT: So we could do that at sidebar?

13 MS. WATERS: We could.

14 THE COURT: Okay. So we talked about expressing  
15 breast milk, that issue, breastfeeding. But then I really  
16 think that we could probably handle the other questions about  
17 anybody's relationship with the fire department, that I can do  
18 in a group setting, if people have any ties to the fire  
19 department. I do that all the time in criminal cases with  
20 ties to law enforcement. We hear all about it. It doesn't  
21 necessarily mean you're automatically excluded if you have  
22 friends who are on the fire department or you worked there at  
23 some point or worked for another fire department. It's just  
24 something for counsel to know. And if you want to exercise  
25 your peremptory strike against that person if they're

1 otherwise fair and impartial, then you can certainly do that.  
2 So I'm not inclined to put those kinds of questions in a  
3 questionnaire.

4 MR. JACOBSON: And, Judge --

5 THE COURT: Yes.

6 MR. JACOBSON: -- maybe I can even be a little more  
7 clear. I'm not even necessarily married to the concept of it  
8 as a questionnaire; I just think these questions need to be  
9 asked at some point during voir dire. I proposed it a juror  
10 questionnaire just for efficiency's sake, but I'm not married  
11 to the concept of it being proposed as a juror questionnaire  
12 that has to be mailed out or -- I just think these questions  
13 or some version of them, however they're worded, needs to be  
14 asked in this case to identify -- especially there's evidence  
15 in this case of a number of comments that were made over  
16 social media, comments that were made to the newspaper after  
17 an article came out about this case that suggests very  
18 strongly that attitude and beliefs about woman pumping in the  
19 workplace, breastfeeding in public are still -- we're not  
20 there yet.

21 THE COURT: I was wondering about your question,  
22 Mr. Jacobson, Do you ever watch women's tennis or golf on  
23 television?

24 MR. JACOBSON: I asked my juror consultant about  
25 that as well, Judge, and he said that there is research on

1 this specific question which is why he asked me to ask it  
2 specifically, about attitudes about gender and women in  
3 general. And remember, we have a female firefighter, so in  
4 this case we have a female who is in a traditional or what is  
5 deemed to be a traditional male role. So the application of  
6 gender to sports is direct there.

7 THE COURT: Okay. All right. Well, I'll take this  
8 under advisement. If I decide this is a good idea, then I'll  
9 probably direct counsel to attempt to come up with some  
10 mutually agreeable questions. I'm thinking we're going to  
11 have a lot of people with children on the panel, so it's not  
12 like some of my questions, If you've ever been convicted a  
13 crime come on up. Well, sometimes we have maybe 15 people  
14 that have been convicted of DUI, but it's not one of those  
15 where we're going to get a very few responses. We can get a  
16 lot of responses on these questions. And I don't know if -- I  
17 think that cuts maybe in favor of having a questionnaire. It  
18 does take more time when you've got to read 65 different  
19 things that morning before we forge ahead with voir dire; so  
20 whether that's worth the time and energy, I don't know.

21 Were you going to say something, Ms. Waters?

22 MS. WATERS: I did want to suggest if we're going to  
23 do a questionnaire, because of the number of responses  
24 involved this might be an instance where it would make sense  
25 to mail it out ahead of time so that we could go through the

1 answers before the jury comes in rather than the lawyers  
2 trying to read through all the questionnaires when we have  
3 people sitting and waiting.

4 THE COURT: Right. Now, what do you think a little  
5 summary would be appropriate, Mr. Jacobson, if we're going to  
6 mail it to them or not?

7 MR. JACOBSON: I think that's fine, Judge. And I  
8 think the proposed -- the language that we have in the joint  
9 pretrial order is perfectly fine.

10 THE COURT: All right. So I think I heard  
11 adequately, especially with the briefing, from both sides on  
12 that issue.

13 So let's go ahead and move to the motions in limine  
14 regarding witness testimony. So we'll start with you,  
15 Mr. Jacobson. Let's see, this is Document 152. The first  
16 is -- I'm sure I'll mispronounce this, Ariane Phaneuf,  
17 P-h-a-n-e-u-f.

18 MR. JACOBSON: Judge, I think now that I've read the  
19 City's response to my motion in limine, I understand a little  
20 better or I have some clarity as to what Ms. Phaneuf's  
21 testimony would be, and I don't have a problem with  
22 Ms. Phaneuf testifying. As long as it stays within the  
23 boundaries that the City has articulated, I see the relevance  
24 based on the explanation. I didn't see it in the way it was  
25 framed in the previous pleadings, but I understand it now so

1 I'm comfortable with Ms. Phaneuf.

2 THE COURT: All right. And anything further that  
3 the defense wants to talk about on that issue?

4 MS. SAAVEDRA: No, your Honor.

5 THE COURT: All right. So the minute entry will  
6 reflect that plaintiff's motion in limine as to Ms. Phaneuf is  
7 withdrawn.

8 And obviously as we go through these, if anything  
9 happens during trial that changes some of these issues,  
10 certainly let me know. But don't just assume things. Come on  
11 up to sidebar and say we anticipate this is going to happen or  
12 that's going to happen. Because sometimes things change  
13 during trial as to the relevance of certain evidence or  
14 admissibility of certain evidence. So these are preliminary  
15 rulings based on what the Court knows and the parties know  
16 now. But obviously trials are very fluid. Things could  
17 change.

18 All right. So Mr. Jacobson, your next one is Nikki  
19 Sprenger, S-p-r-e-n-g-e-r.

20 MR. JACOBSON: And Judge, Ms. Sprenger and  
21 Mr. Vincent sort of dovetail together.

22 THE COURT: Talk about both of them.

23 MR. JACOBSON: Judge, they're just not relevant or  
24 material to the issues in this case. Most of what occurred in  
25 fire prevention has already been adjudicated in summary

1 judgment. You've basically said, hey, we did not allege  
2 hostile work environment; and even if we did, you found that  
3 it would have been a hostile work environment in fire  
4 prevention. Ms. Sprenger and Mr. Vincent are expected to  
5 testify to just those issues. In fact, the City in this case  
6 wants its cake and to eat it as well. They said, well, it  
7 wasn't a hostile work environment, but we want to dirty up  
8 Ms. Clark with testimony from Ms. Sprenger and Mr. Vincent to  
9 say she was disruptive and she was a problem and she was, you  
10 know, she -- we didn't get along with her. Well, that's  
11 precisely the issues that you adjudicated to say, well, no  
12 way, that's not what applies. The educational counseling in  
13 fire prevention is certainly fair game, but the educational  
14 counseling is essentially the boundaries which are set forth  
15 in the document it itself.

16 So if the chief gave her an educational counseling  
17 based on factors which were not articulated in the document,  
18 that's a problem for the government, for the City, so I would  
19 say that Ms. Sprenger and Mr. Vincent are only going to kick  
20 the door open to issues you have already adjudicated on  
21 summary judgment. And that would be complete patently unfair  
22 to the plaintiff and would require me to put on a whole bunch  
23 of other witnesses to dispute what Ms. Sprenger and  
24 Mr. Vincent are saying.

25 THE COURT: All right. Thank you.



1           So let's see, who's going to talk about that.

2           MS. SAAVEDRA: That's me, your Honor.

3           THE COURT: Ms. Saavedra. Go ahead.

4           MS. SAAVEDRA: Thank you.

5           Perhaps plaintiff misunderstands again the purpose  
6 of us calling the witnesses. The hostile work environment  
7 dealt with an earlier environment that Carrie Clark alleged  
8 she was subjected to mainly dealing with Captain Langejans and  
9 the multiple complaints she had about him and her husband's  
10 complaints about him and other employees' complaints about him  
11 as a captain.

12           The issues that these witnesses are going to be  
13 called about are the issues that occurred in fire prevention  
14 much later on, issues that the Court has not disposed of in  
15 the motion for summary judgment. The City understands that  
16 plaintiff is claiming that the complaint she filed in March of  
17 2016 was the basis for some retaliation that occurred  
18 afterwards. Our understanding is also that the retaliation or  
19 the discrimination, because we don't know which yet, was the  
20 educational counseling that she received from Ken Brouillette  
21 in March of 2016 and her transfer from fire prevention back  
22 out to operations in I believe it was April of 2016. Our  
23 understanding is that those are the bases of her  
24 discrimination slash retaliation claims in fire prevention  
25 that have -- that have survived the summary judgment motions,

1 in which case that's why these witnesses are relevant.

2 And Nikki and John Vincent are being called to  
3 discuss a specific incident that occurred. Just as our  
4 response to the motion in limine set forth, we intend to have  
5 them testify about a specific incident that occurred between  
6 Carrie Clark and Nikki Sprenger which John Vincent was  
7 initially part of and witnessed firsthand. This incident was  
8 also documented by Carrie Clark herself, and we have  
9 documentation to that effect which we also intend to produce  
10 during the trial. This incident was one of the factors that  
11 Chief Critchley specifically testified to in his deposition as  
12 part of the basis he wanted -- as part of the basis for him  
13 deciding to transfer Carrie Clark back out to operations in  
14 April of 2016.

15 THE COURT: What was the date of the incident?

16 MS. SAAVEDRA: March 11th, 2016, is my  
17 recollection --

18 THE COURT: Okay.

19 MS. SAAVEDRA: -- of the incident date.

20 THE COURT: All right. Do you need both to bring  
21 this out to the jury? You need both these people,  
22 Ms. Sprenger and Mr. Vincent?

23 MS. SAAVEDRA: Yes, your Honor, because it puts the  
24 incident in context. It first began with a discussion between  
25 Carrie Clark and John Vincent, a discussion of Carrie Clark

1 criticizing Nikki's work to John Vincent. Nikki overhearing  
2 it; Nikki then becoming a part of that conversation; and then  
3 additional comments that Carrie Clark made to Nikki which John  
4 witnessed. So it's corroborates Nikki's side of the story.

5 Because there are going to be two versions of the  
6 story, and the jury needs to determine who is more credible.  
7 And John Vincent's testimony is not going to be based upon  
8 hearsay; it's going to be based upon firsthand observations  
9 that he made. And again, a lot of this case, your Honor, is  
10 going to come down to who does the jury believe. And both  
11 witnesses are necessary in order for the City to establish  
12 that this was -- this incident was, in fact, one of the  
13 reasons Chief Critchley transferred her back out to operations  
14 in addition to other reasons that the jury is going to hear.

15 THE COURT: All right. I'm going to go ahead and  
16 overrule that motion in limine and allow Ms. Sprenger and  
17 Mr. Vincent to testify regarding the March 11th, 2016,  
18 incident. I don't think it's going to take too much time. I  
19 don't think we're going to have a mini-trial on something  
20 that's not really relevant and appears to me to be relevant  
21 testimony for the defense to present.

22 MR. JACOBSON: Judge, may be given leave to depose  
23 Mr. Vincent? Because he was not listed in any witness  
24 statement, he's nowhere to be found, so I didn't have notice  
25 that Mr. Vincent was going to be called as a witness.

1 THE COURT: Oh, okay. Well, you listed him.

2 MR. JACOBSON: What?

3 THE COURT: You listed him.

4 MR. JACOBSON: I understand, but not for this  
5 purpose. Well --

6 THE COURT: Let's see, you listed him as a lay  
7 witness in your third supplemental disclosure.

8 MR. JACOBSON: For the Langejans stuff.

9 THE COURT: Okay.

10 MR. JACOBSON: Not for this.

11 THE COURT: Okay. So do you think you need to talk  
12 to him?

13 MR. JACOBSON: I would like to. I have no idea what  
14 he's going to say.

15 THE COURT: All right. Is there any objection to  
16 that short deposition of Mr. Vincent?

17 MR. JACOBSON: Yeah, it's going to be very short,  
18 Judge.

19 MS. SAAVEDRA: No, your Honor. We don't object to  
20 that.

21 THE COURT: Okay. All right. Then the minute entry  
22 will reflect that Mr. Jacobson may speak to Mr. Vincent  
23 through deposition about his proposed testimony in this case.

24 Okay. So then we have Ken Brouillette,  
25 B-r-o-u-i-l-e-t-t-e. Do you --

1 MR. JACOBSON: Nothing in addition to what I've  
2 argued, Judge.

3 THE COURT: Okay.

4 MR. JACOBSON: That was more along the lines of  
5 making sure that Mr. Brouillette's testimony is consistent with  
6 the tone and spirit and rulings in the summary judgment order.  
7 So it's just limiting, hey, let's keep it to what we're  
8 arguing in this case.

9 THE COURT: All right. So does the defense want to  
10 be heard about that issue?

11 MS. SAAVEDRA: No, your Honor.

12 THE COURT: Okay. So Mr. Brouillette may testify  
13 consistent with the Court's order regarding the remaining  
14 claims here.

15 Wayne Peate. Dr. Peate, P-e-a-t-e.

16 MR. JACOBSON: I don't think there's any issue as to  
17 what -- he's listed as a custodian of record, but I don't  
18 think there's any issue -- we don't intend on raising any  
19 foundational issues or anything like that at this point.

20 THE COURT: Okay.

21 MR. JACOBSON: Ms. Lundell can testify to the  
22 documents. To the extent that Dr. Peate treated Ms. Clark for  
23 any issues related to this case, I don't have a problem with  
24 him testifying to that. But if he's going to express any  
25 expert testimony or any opinion about Ms. Clark's conditions,

1 I do have a problem with that.

2 THE COURT: All right. So what about that,  
3 Ms. Saavedra?

4 MS. SAAVEDRA: Your Honor, I think there were  
5 multiple witnesses in the motion in limine that he brought up.  
6 The rule applies only to experts, and none of these witnesses  
7 were listed as expert witnesses so that rule doesn't apply.  
8 So I don't know why he would believe that we were going to  
9 call them to testify as experts in this case. We've never  
10 intended nor disclosed them as experts.

11 THE COURT: Okay. So he's just going to talk about  
12 as a custodian of records?

13 MS. SAAVEDRA: If needed, your Honor. The motion in  
14 limine, when we were told it was going to be filed, I think we  
15 were pretty up front why we listed him as a witness. So  
16 again, my response is his moot because we only intend to call  
17 him as a custodian of record if needed.

18 THE COURT: And hopefully counsel can work that out,  
19 and we don't need custodians of record coming into court.  
20 Right?

21 MR. JACOBSON: I'm not aware of any issues with any  
22 foundational -- with any documents as to foundation or  
23 anything, Judge. That would be a surprise.

24 MS. SAAVEDRA: Well, I won't agree to that at this  
25 moment, your Honor.

1 THE COURT: Of course.

2 MS. SAAVEDRA: But I think as far as custodians of  
3 record go, I think we will be able to agree to that.

4 THE COURT: Okay. Obviously, stipulations on  
5 undisputed matters are encouraged by the Court to save time.  
6 And as a judge, I'm sure you all know this, I'm very  
7 sympathetic to the jury and them sitting here for two weeks.  
8 So the more you can do to marry your case down to what they  
9 need to hear and decide, that would be greatly encouraged. So  
10 I'm going to deny the motion in limine to Dr. Peate as moot  
11 given the fact that he's only a fact witness to talk about the  
12 records from the office.

13 And then you have a footnote with all these other  
14 folks. You're just asking -- I'm looking at the bottom  
15 of page 8 of your motion in limine, defendant also includes  
16 this catch-all phrase to its narrative for the following  
17 witnesses.

18 MR. JACOBSON: Yeah, that actually relates to  
19 Mr. Brouillette's testimony, Judge.

20 THE COURT: Okay.

21 MR. JACOBSON: But it's basically, you know, if  
22 they're going to disclose the nature and subject of testimony  
23 and then deviate from that, I'm going to object to that at  
24 trial.

25 THE COURT: Okay. All right. And then we have Jeff

1 Langejans, L-a-n-g-e-j-a-n-s. This again is a cite to the  
2 expert witness disclosure requirement. He's not an expert  
3 witness so given the defense response, I'll go ahead and deny  
4 that motion as moot.

5 And then we have the juror questionnaire. I think  
6 that's it for your motion in limine.

7 MR. JACOBSON: Yes, Judge. Most of the other things  
8 we were able to come to -- mostly other anticipated motions in  
9 limine we were able to come to agreement on and that was the  
10 stipulation filed, Doc 153.

11 THE COURT: Okay. Great.

12 Now, defense motion in limine, the first one is lack  
13 of a specific policy for expressing milk at work. So let me  
14 hear from either Ms. Waters or Ms. Saavedra on that issue.

15 MS. SAAVEDRA: Thank you, your Honor.

16 It's undisputed that the City did not have a  
17 specific policy or procedure that addressed nursing mothers  
18 prior to July of 2013 after it was brought to the City's  
19 attention that they needed to have something to that effect or  
20 they decided they wanted to have something to that effect.

21 However, the federal law doesn't require that a  
22 policy or a procedure be in place. And during the dispositive  
23 motions in the matter, plaintiff kind of inferred that the  
24 fact the City didn't have this policy and procedure somehow  
25 meant they were not within the legal requirements of federal



1 law or they were legally required to have a policy. And that  
2 is just going mis- -- it's just going to mislead the jury.  
3 It's going to confuse the jury as to what is required under  
4 the law. And that's exactly why we filed this motion in  
5 limine, is to make sure that the jury isn't given that  
6 argument or testimony to that effect is not brought out during  
7 the trial.

8 I believe plaintiff conceded to that in their  
9 response, but they went on to provide the Court with the  
10 additional arguments as to what they plan to do with the fact  
11 that the City didn't have the policy or this procedure in  
12 place. And I do want to address those arguments, your Honor,  
13 and make a record that we do seek to preclude those arguments  
14 as well. And we would have filed a motion in limine to do so  
15 had we known that plaintiff intended to make these arguments  
16 to the jury.

17 The plaintiff says that this is evidence of  
18 discrimination in this case. But that's the not case. The  
19 plaintiff relies upon various cases, three cases, that are  
20 completely distinguishable from our case. In these three  
21 cases you're dealing with airlines, airlines that had an  
22 internal policy that was alleged to have been in violation of  
23 the Age Discrimination Employment Act. The plaintiffs in  
24 those cases were raising issues as to that specific policy and  
25 how it applied to them as far as them bidding down to a lower

1 position so that they could remain with the company past the  
2 age of 60, because under federal law they had to retire at the  
3 age of 60 as pilots. As you can see, completely  
4 distinguishable from our case.

5           There's no allegation in this case that Carrie Clark  
6 was discriminated against because of a policy in place at the  
7 time. The policy that plaintiff brings up in the motion in  
8 limine -- or, response to the motion in limine was actually  
9 pulled because the TFD HR manager realized that it was not in  
10 compliance with the law. That policy was never disclosed  
11 during litigation of this case because it's not relevant.

12           THE COURT: This is the pregnancy --

13           MS. SAAVEDRA: Yeah, we had a pregnancy policy that  
14 was clearly not in compliance with the current law. The  
15 TPD -- TFD, sorry, the TFD HR manager pulled it. It didn't  
16 apply to Carrie. It never applied to her. There's no  
17 allegation it applied to her. So the fact that there was this  
18 policy prior to her coming back with her child and then there  
19 wasn't a policy is not evidence of discrimination in this  
20 case, nor has there ever been an allegation that she was  
21 discriminated against because of a policy that was in place.  
22 So I just wanted to make sure that that argument is also  
23 precluded in this trial because there's just no evidence and  
24 legally no factual basis for that.

25           THE COURT: All right. Mr. Jacobson.

1 MR. JACOBSON: Judge, we never intended to argue  
2 that the City was required legally to have a policy. That  
3 was --

4 THE COURT: What are they required to do legally?

5 MR. JACOBSON: Well, they're required to follow the  
6 law, and the absence of a policy is evidence of  
7 discrimination. And the law is very clear on that, Judge.  
8 You can try to distinguish it all day of the week, every day.

9 THE COURT: Are you going to ask for a jury  
10 instruction about that if it's so clear?

11 MR. JACOBSON: I am looking into jury instructions,  
12 Judge. Those are due on March 1st.

13 THE COURT: Okay. I'm just -- so as long as you  
14 adequately --

15 MR. JACOBSON: But the absence of a policy, TFD is a  
16 policy-driven organization. Everything is in a policy. The  
17 manuals --

18 THE COURT: Pages and pages.

19 MR. JACOBSON: It is stacks and stacks and stacks as  
20 a chain-of-command, paramilitary-type organization. And I  
21 expect that the City is going to make a number of arguments  
22 using both policy as sword and shield. So I think I should be  
23 allowed to ask, well, there was no policy was there? You're  
24 aware of the law. What's the policy here? What should  
25 Ms. Clark have done that she didn't do? What was her path to

1 getting relief? I think those questions are very fair game.

2 THE COURT: So the City agrees there was no written  
3 policy? Nothing written down about -- for individual  
4 employees to figure out what to do or for the employer to  
5 figure out what to do in the situations; is that right? There  
6 was nothing written down.

7 MS. SAAVEDRA: As far as a nursing mother?

8 THE COURT: Right.

9 MS. SAAVEDRA: That's correct. Obviously, we have  
10 policies for someone that wants to request accommodations at  
11 work, who wants to request a certain duty, who wants to  
12 request leave, we have those types of policies, yes. But  
13 there's not one that specifically addresses just a nursing  
14 mother.

15 THE COURT: So do you have an objection to the jury  
16 finding that out?

17 MS. SAAVEDRA: Your Honor, we don't have an  
18 objection to that fact coming out. What we have an objection  
19 to is plaintiff arguing to the jury or inferring to the jury  
20 that somehow we were legally required to have a policy or the  
21 lack of a policy was the basis of her sex discrimination claim  
22 because there's no evidence of that.

23 MR. JACOBSON: I think that's fair argument, Judge.  
24 There's nothing -- in fact, the case law says it's fair  
25 argument.

1 THE COURT: Okay. Let me take that under advisement  
2 and take a look at that issue. So the fact that there is not  
3 a policy, that could certainly come out as a fact. And I'll  
4 think about the how the parties can then react to that fact  
5 and argue it. So that's the motion in limine -- this is  
6 Document 147, by the way, for the defense

7 Now, you wouldn't want to bring out the fact,  
8 Mr. Jacobson, that the pregnancy policy was withdrawn, would  
9 you? That's kind of far afield, isn't it, from your case?

10 MR. JACOBSON: Well, Judge, I don't know. It  
11 certainly goes to the knowledge of the law. Because if  
12 Ms. Acosta Acedo is going to say that we follow the law, I  
13 certainly want to be able to say that she had the ability to  
14 pull policies that are relevant, propose policies that are  
15 relevant, she could identify policies that were legal and not  
16 legal. And this is, I think, directly on point for that. I  
17 agree that the pregnancy policy itself may not have helped  
18 Ms. Clark in this case, but I think it's relevant to show  
19 other matters.

20 THE COURT: So is Ms. Acedo Acosta going to be a  
21 witness? HR manager.

22 MR. JACOBSON: Yes.

23 THE COURT: Okay. All right. I'll think about  
24 that. Again, that's kind of related to how the Court is going  
25 to allow both sides to talk about the lack of a policy.

1           Then the second one, Carrie Clark's testimony  
2           pertaining to preferential station assignment because of her  
3           lactating status.

4           MS. SAAVEDRA: Your Honor, we filed this -- first we  
5           asked counsel if he would agree to it and he wouldn't. We  
6           filed it because it's clear in the summary judgment order and  
7           it's clear under the law that she's not entitled to  
8           preferential treatment or entitled to choose what station she  
9           gets to go to just because she was a lactating mother, and  
10          obviously we don't want the jury to hear any sort of inference  
11          or argument to that effect. I think he conceded to that so I  
12          think it should be granted.

13          THE COURT: All right. Mr. Jacobson.

14          MR. JACOBSON: Judge, we strongly disagree with that  
15          characterization in the first place. We wouldn't argue that  
16          Carrie was entitled to some sort of preferential treatment.  
17          That's exactly the attitude that the City had all this time;  
18          that she's not entitled to any preferential treatment, which  
19          is the nature of the case in the first place. They refused to  
20          find her an accommodation whatsoever to address it because, as  
21          I argue in my response, most of TFD stations were not  
22          compliant with federal law for lactating mothers and because  
23          there was no policy or procedure for how to manage the needs  
24          of lactating employees. So this is not about preferential  
25          treatment. We don't intend on arguing that Carrie was

1 entitled to some sort of preferential treatment. She was  
2 entitled to what she's entitled to under the law; that's not  
3 preferential. That's their characterization.

4 THE COURT: All right. I'm going to overrule that  
5 motion in limine in the sense that I will allow plaintiff to  
6 talk about her requests to be assigned to particular stations  
7 and why. The use of the word "preferential," I don't get the  
8 sense plaintiff is going to use that word, but just in order  
9 to comply with the law that she was requesting to be moved to  
10 different locations.

11 So I'll deny that motion in limine. That's No. 2.  
12 So plaintiff can't offer testimony on this issue.

13 3. Francis Kunz, K-u-n-z, her experience as  
14 Carrie's mother and her experiences with Carrie's two sons.  
15 So go ahead. Yes, Ms. Saavedra.

16 MS. SAAVEDRA: Your Honor, we understand that she  
17 was also listed to testify about damages that Ms. Clark -- or,  
18 Mrs. Clark allegedly suffered as a result of the incident, and  
19 we didn't object to that.

20 Our motion in limine specifically addressed this  
21 witness coming in and testifying to the jury about being a  
22 mother in general or being a mother to Carrie or to testify  
23 about her personal experiences with Carrie Clark's children  
24 because they're just not relevant to the issues in this case.  
25 It's a waste of time. It will confuse the jury as to what the

1 relevancy -- what the issues are in this case. I don't  
2 believe plaintiff's response even addressed our argument. All  
3 plaintiff argued was she was a damage witness and she should  
4 be able to come in and speak to the emotional damage in this  
5 case. And we've never objected to that. I don't know how to  
6 respond without knowing what plaintiff's position is on what  
7 we actually filed.

8 THE COURT: All right. We're waiting to hear from  
9 you, Mr. Jacobson.

10 MR. JACOBSON: Hey, Judge, what happened with Carrie  
11 and what happened with her mom, they have long -- the City has  
12 long argued that the only reason that Carrie wanted certain  
13 station assignments was to make it more convenient for her  
14 mother. So if they're going to argue that and then seek to  
15 exclude Ms. Kunz as a witness because it's not relevant is  
16 disingenuous.

17 THE COURT: Is the City going to argue that?

18 MS. SAAVEDRA: Your Honor, there's evidence that  
19 Carrie Clark said that so it's going to come out in evidence.

20 THE COURT: So you want to bring out that that was  
21 the reason. Okay. So then why wouldn't --

22 MR. JACOBSON: Why wouldn't Ms. Kunz be relevant?

23 THE COURT: So you agree that Ms. Kunz can at least  
24 talk about those facts.

25 MS. SAAVEDRA: Well, your Honor, he's saying -- if



1 plaintiff counsel is saying he's going to call Ms. Kunz to  
2 rebut that Carrie requested the station to be closer to her  
3 mom, then obviously we don't object to that. But that's not  
4 what he's saying he's going to call her for.

5 THE COURT: So your client asked for the station to  
6 be closer to her mother or is that an issue in dispute?

7 MR. JACOBSON: That is somewhat of an issue in  
8 dispute, Judge. The entire experience, right -- so you have  
9 to put this argument in context.

10 Ms. Clark was trying to express fresh milk for her  
11 son. She was having a hard time doing so. The stress of the  
12 way she was being treated by TFD was affecting her. All of it  
13 comes into play. Her son's health as it relates to the fact  
14 that she couldn't properly -- express the proper volume at the  
15 time, why she was having all these struggles emotionally with  
16 not having any certainty as to where as she was going to work,  
17 the effect it had on her son and her mother, in fact, because,  
18 you know, you've got to put a sick, screaming baby into a car  
19 seat who's hungry and drive to God knows where, what ends of  
20 the earth in the City, all of that is relevant. I mean, if  
21 they're going to make her mother an issue in this case, I  
22 think I'm entitled to tell the entire story. And they want to  
23 limit it because they know that that has -- that is going to  
24 affect the damages in this case.

25 THE COURT: Well, let's see how this comes out at

1 trial. I'll go ahead and take the expansiveness or lack  
2 thereof of the testimony of Ms. Kunz, I'll take that under  
3 advisement. I just want to see how the case develops.  
4 Certainly she can testify as to damages and what she observed  
5 regarding Ms. Clark, but whether I'm going to allow her to  
6 talk about and given opinions as to the request to be at  
7 particular stations for particular reasons, I'll go ahead and  
8 take that under advisement.

9           So Mr. Jacobson, do you have an expert witness who  
10 is going to link the health of the child with the inability to  
11 accommodate your client?

12           MR. JACOBSON: The doctor who treated Austin Clark  
13 is listed as a witness, and my client who is an RN is going to  
14 testify about her experience and her knowledge. I'm not  
15 offering it as expert testimony, just as to her experience and  
16 her knowledge; as well as the doctor as to what he did, how he  
17 treated, what his diagnosis and impressions were.

18           THE COURT: So he is going to opine that there was a  
19 link between the child's health and Ms. Clark's difficulty in  
20 having a place to properly --

21           MR. JACOBSON: Oh, I think that's clear from the  
22 record. I don't know that that's -- I mean --

23           THE COURT: That's an expert, right? That's  
24 something outside the normal province of the jury. I don't  
25 know if this is an issue or not.

1 MR. JACOBSON: I don't think he's a treating  
2 physician, Judge, so I don't see it as him offering expert  
3 testimony about in general things. I mean, he's going to talk  
4 about this specific instance, his knowledge. I'm not treating  
5 it as expert testimony. I didn't think of it as expert  
6 testimony. We had discussed the lactation expert who would  
7 have testified differently, but that was withdrawn.

8 THE COURT: Okay. So he's a fact witness?

9 MR. JACOBSON: He's a fact witness.

10 THE COURT: Defense agree with that?

11 MS. SAAVEDRA: Your Honor, I would like to address  
12 Austin's doctor. It's actually --

13 THE COURT: It's coming up.

14 MS. SAAVEDRA: It's coming up. If Mr. Jacobson  
15 wants to argue it now, the City would like to respond to that  
16 argument.

17 THE COURT: I think I brought it up. Let's wait  
18 till we get there.

19 MS. SAAVEDRA: Okay.

20 THE COURT: So the next one, Carrie Clark's  
21 testimony about other employee's assignments or the alleged  
22 reason for the assignments.

23 MS. SAAVEDRA: Yes. So Carrie has testified in her  
24 deposition that she knew about one person, Brad DeCastro, and  
25 that came up when she was being asked whether or not

1 Chief Nied advised her that, You're not allowed to swap  
2 positions. And during her deposition her response to that  
3 question was that she brought up Brad DeCastro and this DUI he  
4 allegedly had as a reference to Chief Nied.

5 Now, no other questions in regards to Brad DeCastro  
6 or any of these other people that have been listed to testify  
7 about their alleged criminal arrests or investigations or  
8 alleged convictions, none of the specifics about that came up  
9 during her deposition. The City did not ask her any questions  
10 about that, and her counsel never asked her any questions  
11 about that, and we most certainly would have objected based on  
12 foundation if he had done so.

13 So I want to address first his argument that he  
14 thinks we -- that plaintiff counsel believes we waived our  
15 objection. We did not. First of all, he references a rule  
16 that, again, doesn't apply. He references a rule that deals  
17 with waiver of notices of depositions, then he cites some  
18 other cases that deal with the appropriate rule, which is  
19 Rule 32(d)(3)(A). But if you read those cases, they're  
20 distinguishable from what happened here because, again, she  
21 wasn't questioned about the specifics in her deposition; there  
22 was no waiver of those objections to be brought up at trial.  
23 So I don't think that that was a good argument on plaintiff's  
24 part as far as allowing her to move forward.

25 The City has provided you with proof, your Honor,

1 based upon her own statements to Marty Macias that she has no  
2 personal knowledge about Brad DeCastro or any of these other  
3 witnesses that she intends to call at trial to establish that  
4 they had some sort of criminal arrest or criminal  
5 investigation or convictions or that this somehow affected  
6 their assignments at TFD. We have no idea -- and that goes  
7 into another motion in limine. We have no idea who made the  
8 decision where they were going to be assigned, we have no idea  
9 where they were initially assigned.

10 This motion in limine specifically addressed Carrie  
11 Clark's ability to testify to things because they are hearsay  
12 and they are based upon her speculation, things that she heard  
13 from other people, not based on firsthand knowledge, not a  
14 statement against interest under the rule like plaintiff's  
15 counsel would like you to believe. There's no evidence that  
16 these individuals ever made a statement to Mrs. Clark about  
17 any of these factual situations. So that rule doesn't even  
18 apply. She can't even establish any of the criteria under  
19 that rule.

20 THE COURT: How many people are we talking about?

21 MS. SAAVEDRA: There are three.

22 THE COURT: Three. Okay. Well, let me --

23 MS. SAAVEDRA: Would you like to know their names?

24 THE COURT: No, that's okay.

25 You agree your client can talk about that. That

1 would be all hearsay, what she heard as to what happened to  
2 other people.

3 MR. JACOBSON: Well, technically, I believe so.  
4 Now, Judge, I want to point out a couple of things.

5 She cites to a statement that Ms. Clark gave to  
6 Marty Macias in 2013. At the time she gave the statement to  
7 Marty Macias that was accurate. That was five years ago. The  
8 arguments that this is hearsay from stuff that she heard in  
9 other places is incomplete at best because the City knows that  
10 it has a telestaff system that records and time stamps every  
11 move and the reasons why for those moves. So in other  
12 words --

13 THE COURT: How is it relevant? Are we going to get  
14 into the little mini-trial about three guys' DUI allegations?

15 MR. JACOBSON: I'm not interested -- I'm not  
16 interested in whether or not he actually committed DUI. I'm  
17 interested in the fact that you had male employees who were --  
18 who had -- I'm searching for it -- disabilities, for lack of a  
19 better term, related to their employment that were  
20 accommodated by the employer for stuff that was allegedly  
21 pretty serious, right? If it's a DUI, they're accommodating  
22 him because he can't drive a vehicle without a -- without an  
23 ignition interlock device. So they're treating males who  
24 have, for lack of a better term, disabilities related that  
25 affect their employment, they're accommodating them. They're

1 going out of their way, they're making exceptions to the rules  
2 of assignment to the policies that they cite as a sword and a  
3 shield. But when it came time to putting Carrie at a station  
4 that had a locking door on it or had privacy, all hell breaks  
5 loose.

6 THE COURT: Well, was it during the same period of  
7 time?

8 MR. JACOBSON: Yeah.

9 THE COURT: And we're talking about three people?

10 MR. JACOBSON: Yeah.

11 THE COURT: Who have been subpoenaed for trial?

12 (Attorney-client discussion.)

13 MR. JACOBSON: I apologize, Judge. My client tells  
14 me Mr. DeCastro was at the same time. The other two gentleman  
15 were before Ms. Clark's situation.

16 THE COURT: So you're just proposing that  
17 Mr. DeCastro's -- what happened to him would be relevant in  
18 this case?

19 MR. JACOBSON: Well, I would say all three of them  
20 are relevant. The fact that these other two occurred before  
21 Carrie's situation doesn't obviate the facts underlying the  
22 accommodations that the City made.

23 THE COURT: How many people at the fire department?  
24 How many employees are we talking?

25 MR. JACOBSON: It's under 700, Judge.

1 THE COURT: I can imagine there's all sorts of,  
2 well, things going on in the personnel arena. Things --

3 MR. JACOBSON: And again, I'm not interested in  
4 adjudicating whether or not he did or did not do what he was  
5 accused of doing. It's not an alleged DUI, it was a DUI, so  
6 I'm not interested in that. I'm interested in the  
7 accommodation argument to say the City can choose and did, in  
8 fact, choose to accommodate three males who had these issues  
9 that were related to their employment. But when it came time  
10 to accommodating a woman who was expressing breast milk, it  
11 was chaos.

12 THE COURT: All right. Well, I'm going to, on just  
13 the limited issue of whether Ms. Clark can testify about that,  
14 I will grant that motion in limine because that appears to be  
15 based on hearsay. But it appears to me it's relevant how  
16 other people with obviously different issues from Ms. Clark,  
17 but other people that asked for accommodations, how they were  
18 treated by the fire department. I'll allow some limited, you  
19 talked about three at the most --

20 MR. JACOBSON: Yes, your Honor.

21 THE COURT: -- people. So I'll allow some limited  
22 inquiry. But obviously you have to follow the Rules of  
23 Evidence. You can't --

24 MR. JACOBSON: And, Judge, what I would ask is if I  
25 could allow Ms. Clark to try to establish foundation. If I



1 can't establish foundation, I can't establish foundation.  
2 That's true of any issue.

3 THE COURT: And I guess you can do that outside the  
4 presence of the jury.

5 Yes, Ms. Saavedra.

6 MS. SAAVEDRA: Your Honor, I wanted to address the  
7 three witnesses themselves before you make a ruling on that.  
8 That's part of another motion in limine that we haven't  
9 addressed yet.

10 THE COURT: Okay.

11 MS. SAAVEDRA: I was just addressing Carrie  
12 testifying to these things that are hearsay.

13 THE COURT: Okay. That's testimony from other  
14 employees' alleged crimes or involvement with the judicial  
15 system and the alleged effect on their work assignments. So  
16 do you want to talk about that now since it's so tied in?

17 MS. SAAVEDRA: Sure, your Honor.

18 THE COURT: So these are the three people, the same  
19 three people -- I already forgot the name. Mr. Brad DeCastro  
20 and two other people that apparently had issues with drinking  
21 and driving and were somehow accommodated by the fire  
22 department. Go ahead.

23 MS. SAAVEDRA: I don't know, your Honor. Part of my  
24 motion in limine is the fact that none of these facts or  
25 circumstances have been disclosed in this case. There's one

1 thing I did not raise in my motion in limine because I didn't  
2 realize it until preparing for today's argument, is that  
3 another basis to preclude these witnesses would be late  
4 disclosure.

5 If you recall, plaintiff moved to amend their  
6 complaint and file a third amended complaint. I believe it  
7 was in February of 2017. The Court granted leave to amend and  
8 plaintiff filed her third amended complaint in March of 2017.  
9 At that time, your Honor issued an order which extended the  
10 discovery deadline for those new claims that arose in the  
11 third amended complaint. Well, according to plaintiff, these  
12 three witnesses have always related to her initial complaint  
13 where she alleged she was discriminated against or retaliated  
14 against because of her denial of the assignment to Station 12.  
15 So they were not disclosed until this extended deadline of  
16 June 30th, 2017, so there was late disclosure of those  
17 witnesses.

18 THE COURT: So they were specifically listed,  
19 though?

20 MS. SAAVEDRA: No, your Honor, they were not listed  
21 as witnesses until June 30th of 2015.

22 MR. JACOBSON: So they were. The answer is yes,  
23 Judge. They were disclosed.

24 MS. SAAVEDRA: If you could show me which  
25 disclosure. I have a copy of the disclosure they were

1 disclosed in with me if you'd like to see one.

2 MR. JACOBSON: In 2015 they were disclosed.

3 MS. SAAVEDRA: No, your Honor. If you would like to  
4 provide proof of that --

5 THE COURT: Luckily, the docket is not cluttered  
6 with all the disclosure that takes place between the parties.

7 MS. SAAVEDRA: I did print out a copy of the  
8 relevant disclosure where they were disclosed.

9 THE COURT: So it's the City's position that the  
10 names of these people and what their proposed testimony is has  
11 never been disclosed, either initially when the case was filed  
12 or after the third amended complaint.

13 MS. SAAVEDRA: No, they were disclosed after the  
14 third amended complaint --

15 THE COURT: Oh, okay.

16 MS. SAAVEDRA: -- was filed on the discovery  
17 deadline that your Honor extended for the new claims. So  
18 technically it was late disclosure for those witnesses.

19 Their names did come up during the summary judgment  
20 motions, and plaintiff used her own hearsay and speculative  
21 testimony about them as facts in her personal -- in her  
22 cross-motion for summary judgment and her response to our  
23 motion for summary judgment. But their names and testimony  
24 were not listed until June 30th of 2017. I just want to make  
25 a record of that, your Honor, because I did not raise that in

1 my motion in limine.

2 THE COURT: And what happened after they were listed  
3 by Mr. Jacobson? Did you say, We need to talk to these  
4 people. Who are these people?

5 MS. SAAVEDRA: We did not say that, your Honor. Nor  
6 did Mr. Jacobson disclose any information in regards to those  
7 people.

8 THE COURT: So these three names were just listed in  
9 June of 2017, but not a summary of what their anticipated  
10 testimony was or anything like that.

11 MS. SAAVEDRA: Well, a general summary, your Honor.  
12 And I did bring it because I want to read to you the general  
13 disclosure --

14 THE COURT: Okay.

15 MS. SAAVEDRA: -- of what they were going to testify  
16 about.

17 MR. JACOBSON: Judge, I'm really -- I know you may  
18 be interested in this, but, you know, Judge, this argument was  
19 waived because they did not raise it in their motions in  
20 limine. And the law is very clear. This is the kind of --  
21 this is the kind of -- I'm not going to say it. If you had an  
22 argument about it, you argue it. Don't come at me with this  
23 when I haven't had an opportunity to prepare, to review any of  
24 the documents to rebut these arguments, when I don't have my  
25 documents with me. It's kind of, sneak attack is really

1 unnecessary, Judge, and unfair and I'm objecting for the  
2 record.

3 THE COURT: All right. I'll go ahead and hear it,  
4 though.

5 Go ahead. Do you want to read the summary?

6 MS. SAAVEDRA: Yes, your Honor. I'm moving on from  
7 the fact that I raised they're late disclosed. I believe  
8 that's what he's addressing with your Honor. I'm moving on  
9 from that. I'm moving on to the basis for the motion in  
10 limine that I did address with the Court.

11 THE COURT: Okay. Go ahead.

12 MS. SAAVEDRA: So these witnesses were disclosed in  
13 very general terms. I don't know how to say his first name,  
14 but Mr. Camarena was disclosed to be expected to testify to  
15 his experience at work after being convicted of driving under  
16 the influence, his assignments, and any administrative action  
17 that was taken as a result. So there was that very general  
18 disclosure, but nothing, no facts to support this have ever  
19 been disclosed.

20 So the City -- and plaintiff argues that because  
21 we're the City and these are our City employees, we should  
22 have all the information so he doesn't have to disclose it.  
23 But your Honor, I think the Federal Rules of Civil Procedure,  
24 the disclosure rule, the spirit of that rule is to make sure  
25 that parties don't walk into trial and be ambushed by

1 information they weren't provided during disclosure. If  
2 plaintiff wanted to use these underlying facts and  
3 circumstances to prove her case, she should have disclosed  
4 them in the disclosure in the almost five years of litigation  
5 of this case. We have no idea whether or not the fact that  
6 they were -- other than Brad DeCastro, there was a disclosure  
7 of his DUI report, but nothing with regards to what happened  
8 with that.

9 Other than that, there's been no disclosure of what  
10 the criminal investigations entailed, what they were arrested  
11 for, what the conviction was, how that was communicated to the  
12 fire department or the City, what actions the City took, what  
13 the TFD administration took. We have no idea where they were  
14 originally assigned or where they were assigned later on or  
15 the reason for the assignment. There's been no evidence that  
16 these witnesses requested -- and I want to go back,  
17 your Honor, to the burden of plaintiff under a sex  
18 discrimination claim.

19 They have to present evidence to the jury to show  
20 the jury that these people were similarly situated and that  
21 they were treated more favorably than plaintiff. Well, they  
22 don't have the evidence to present to the jury other than,  
23 yeah, they had a DUI and they were moved to the station.  
24 There's no evidence as to why that decision was made. There's  
25 no evidence to show that connection that they requested this.

1 Her whole claim is based upon the fact that she requested a  
2 specific station and/or requested to be swapped with Jeff Todd  
3 so she could work at Station 12 and TFD denied her that. To  
4 show they're similarly situated she has to prove not only  
5 factually the circumstances similar, which I don't know why  
6 we're comparing DUIs and other criminal convictions to a  
7 lactating mother, the argument was that it's their ability to  
8 work, but there's not even evidence this has affected their  
9 ability to work. That hasn't come in during the litigation of  
10 the case.

11 But moving back to her being able to prove they were  
12 treated more favorably, she has to present evidence to the  
13 jury that they requested a specific station and was denied  
14 that station or they requested to be swapped with a person and  
15 they were denied that request. There's no evidence of that in  
16 this case. None. And that's exactly why we're moving to  
17 preclude these witnesses, because there's been no evidence  
18 disclosed to support what Mr. Jacobson is saying they're going  
19 to come and testify about.

20 THE COURT: So Mr. Jacobson, for example, never  
21 deposed some personnel person or asked them about the three  
22 employees and what happened to them and why were they treated  
23 this way or that way?

24 MS. SAAVEDRA: No, your Honor.

25 THE COURT: Okay. All right. Mr. Jacobson.

1 MR. JACOBSON: Judge, we did ask Mr. Fischback who  
2 was an assistant chief, I believe, at the time that we deposed  
3 him about how the department handles DUIs in cases like this.  
4 It's exactly this kind of, Do as I say not as I do, that  
5 drives me crazy in this case. They say don't ambush us, but  
6 they ambush us when it comes to Mr. Vincent's testimony and  
7 the City ambushes us when it comes to late disclosure  
8 argument. In fact, the disclosure rules are about notice.  
9 They were on notice precisely what -- they knew exactly what I  
10 was arguing.

11 Mr. DeCastro was on a swing shift just like Carrie  
12 was. Mr. DeCastro got a DUI for which there is no policy, yet  
13 they accommodated him. They put him, a male, in a position --  
14 in a long-term assignment to accommodate his condition. When  
15 it came to Carrie they didn't do that. So this argument about  
16 we didn't disclose the DUI, it's not about the DUI. It's  
17 about what they did with it. So why would I need to ask him  
18 anything about -- asking him anything about his DUI is  
19 collateral. It's not relevant. The fact of the conviction,  
20 the fact that he had a condition that affected his employment  
21 that they made an accommodation for under the same set of  
22 circumstances is what's relevant.

23 THE COURT: And what about the other two people?

24 MR. JACOBSON: Judge, Mr. Camarena, I argue this in  
25 my response, Document 162. Mr. Camarena was moved from a



1 paramedic truck to a fire engine to accommodate the fact that  
2 he could not drive. And Mr. Valenzuela was moved from a  
3 24-hour operation shift to an eight-hour administrative  
4 position.

5 THE COURT: And so that information was disclosed by  
6 you prior to your filing your motion in limine or response?

7 MR. JACOBSON: Judge --

8 THE COURT: I mean, I know you're saying the City  
9 has all those records --

10 MR. JACOBSON: I apologize, Judge. I'm not prepared  
11 to argue the disclosure. I don't have it with me.

12 THE COURT: Oh.

13 MR. JACOBSON: And they didn't argue that in the  
14 motion in limine.

15 THE COURT: Okay.

16 MR. JACOBSON: But they have it. Clearly they  
17 have -- they have a document with them here today. They knew  
18 what they were -- they knew what I was disclosing them for.

19 THE COURT: All right. Well, let me think about  
20 that one.

21 MS. SAAVEDRA: Your Honor, can I just say one thing?

22 THE COURT: Sure, go ahead.

23 MS. SAAVEDRA: Because you're taking that under  
24 advisement, the City would request to be able to depose these  
25 witnesses if they are going to be allowed to come and testify

1 and also provide any late disclosure that would rebut her  
2 claims as to these witnesses.

3 THE COURT: Yes. Absolutely. If I do allow these,  
4 it would be the three people, right? I'll give the government  
5 an opportunity to depose these people.

6 MR. JACOBSON: And I assume, Judge, I'll be able to  
7 ask questions at the deposition as well. It's a standard  
8 deposition.

9 THE COURT: Yes.

10 MR. JACOBSON: Okay.

11 THE COURT: And obviously if I allowed that limited  
12 discovery to occur and we get new information based on that,  
13 that could -- if I decide to let it in, I could change my mind  
14 depending on what type of information would be developed  
15 through the discovery.

16 Now, Diana Benson's testimony, plaintiff withdraws  
17 Ms. Benson from the case, right? So that's moot,  
18 Mr. Jacobson?

19 MR. JACOBSON: Yes.

20 THE COURT: Testimony from union representatives,  
21 Sloan Tamietti, T-a-m-i-e-t-t-i, Jon North, and Roger  
22 Tamietti. Plaintiff claims all three individuals were present  
23 and personally observed important events.

24 So let's see, Ms. Saavedra, do you want to be heard  
25 regarding that part of your motion in limine?

1 MS. SAAVEDRA: Yes, your Honor. I guess I need to  
2 take each one in turn.

3 THE COURT: Okay.

4 MS. SAAVEDRA: As a general matter, the City moved  
5 to preclude these witnesses because we understood that these  
6 witnesses were going to be called to testify about meetings or  
7 interviews that they would have sat in on with plaintiff, and  
8 that was the only reason we thought they were going to be  
9 called to testify which would have just been cumulative. And  
10 it would have been hearsay because they didn't participate in  
11 anything that was going on; they were just basically there  
12 as moral support for plaintiff during these interviews and  
13 meetings. But in response to the motion in limine for each  
14 witness, plaintiff has now set forth other testimony that  
15 these witnesses are now going to be called to testify to, none  
16 of which were disclosed, your Honor during the disclosure or  
17 in the joint report for this case, for that matter, which the  
18 Court can bring up and look at.

19 So again, I don't want to waste the Court's time,  
20 but all of the items that are listed for Sloan Tamietti now as  
21 far as him testifying to notes he took on March 20th during  
22 some meeting that happened, any follow-up conversations he had  
23 with Deputy Chief Rodriguez, any alleged meetings that he had  
24 with AC Mike Fischback after plaintiff left the meeting, none  
25 of this has been disclosed.

1 MR. JACOBSON: Judge, again --

2 THE COURT: Hold on a second. Let her finish.

3 MS. SAAVEDRA: Jon North, he was never disclosed to  
4 testify about an interview regarding plaintiff coming in on  
5 her day off. Nor was he disclosed to testify about his  
6 alleged knowledge of personnel issues in general about TFD.  
7 His wasn't disclosed -- his knowledge in regards to TFD's  
8 inconsistent application of its own policies because he took  
9 over I guess in 2016, that's never been disclosed either.

10 Roger Tamietti, never disclosed to talk about  
11 numerous conversations he allegedly had with Chief Critchley  
12 about plaintiff's alleged attempt to secure private space to  
13 pump. He was never disclosed to talk about daily  
14 conversations he had with her. Nor was he disclosed to talk  
15 about his experience about knowing and working with plaintiff  
16 as an emotional distress damage witness, which obviously if he  
17 could testify to those things, the City is got going to  
18 object, but he was never disclosed to talk about these  
19 matters, your Honor.

20 That's really what I have to say, your Honor. I  
21 don't know how plaintiff wants to respond to that.

22 THE COURT: All right. Go ahead, Mr. Jacobson.

23 MR. JACOBSON: Well, No. 1, Judge, once again  
24 ambush. There was no argument that we didn't disclose them  
25 for the matters. No. 1. So they waived that argument.

1           No. 2, they didn't disclose Sloan Tamietti during  
2 the meet and confer period as a witness that they were going  
3 to file a motion in limine regarding. So what they do, Judge,  
4 what the City does is talk out of both sides of their mouth on  
5 these issues. Don't ambush us, but yet we're going to argue  
6 thing that we didn't argue in our motion in limine. They  
7 didn't meet and confer with us about this. Well, they didn't  
8 meet and confer.

9           The other problem I have, Judge, the rules do not  
10 require me or any party to disclose every single fact or  
11 argument I'm going to make as to every single witness. I'm  
12 required to disclose the topics, I'm required to disclose the  
13 nature of the testimony. They all knew who these people were.  
14 They're their employees. They've done their own  
15 investigation. They know everything about these cases, about  
16 these witnesses. So this concept that they -- that they're --  
17 these are not outside witnesses. These are not witnesses that  
18 I'm bringing in that are not their own employees. They know  
19 everything about what these witnesses are to going say. They  
20 know more about what the witnesses are going to say than I do  
21 because they've interviewed them.

22           So as far as Sloan Tamietti goes, they waived the  
23 right to argue because they didn't meet and confer on Sloan  
24 Tamietti. Each one of these people has relevant, material  
25 information about the facts and circumstances of this case

1 which I have outlined in my responses, Judge. This, They  
2 didn't disclose every single fact that every single thing  
3 they're going to testify to, show me a rule where that is  
4 required.

5 THE COURT: All right. Let me take a look -- do you  
6 want to be heard?

7 MS. SAAVEDRA: Yes, your Honor. All I want to say  
8 is that the City could not address the testimony that  
9 plaintiff is now saying they were going to testify to because  
10 we had no knowledge. We had no notice that -- plaintiff's  
11 counsel was planning to call these witnesses to testify to  
12 these things. And that's exactly why I wanted to address it  
13 today because we couldn't raise it in our motion in limine.  
14 We didn't know.

15 THE COURT: Okay. So now these people haven't been  
16 disposed?

17 MS. SAAVEDRA: No, your Honor. And just for the  
18 record, the City has not interviewed these witnesses.

19 THE COURT: Okay. And we're talking about the three  
20 or there are others also, right?

21 MS. SAAVEDRA: There is more to come, your Honor.

22 THE COURT: Josh Campbell, Chris Conger, Martin  
23 Brown.

24 So Mr. Jacobson, you're making the same argument as  
25 to the additional witnesses?

1 MR. JACOBSON: Yes, Judge.

2 THE COURT: That they are fact witnesses.

3 MR. JACOBSON: Yeah, absolutely.

4 And for example, Mr. Brown, he testified -- he -- he  
5 witnessed the specific incident between Nikki Sprenger and  
6 Ms. Clark. So if Mr. Vincent is allowed to testify to it,  
7 then Mr. Brown should be allowed to testify to it.

8 THE COURT: Is that something that you've disclosed?  
9 I mean, the City has an idea of what you would call them for?

10 MR. JACOBSON: Judge, again this nondisclosure  
11 argument was never raised in any motion in limine. I don't  
12 have any of my disclosure statements. There were at least  
13 eleven disclosure statements from the City. There were at  
14 least I think five or six from us. I haven't reviewed that in  
15 preparation for this.

16 THE COURT: Okay.

17 MR. JACOBSON: So I can't answer your question  
18 candidly, Judge.

19 THE COURT: Here it says Martin "Harvey" Brown is  
20 expected to testify regarding plaintiff's light duty  
21 assignment in 2014 and his experience working in fire  
22 prevention. He had no personal involvement in plaintiff's  
23 light duty assignment, and any testimony regarding her  
24 assignment would be hearsay. I'm just looking at  
25 Document 151, page 5. His experiences in fire prevention are

1 irrelevant to the issues and should be precluded.

2 So one way to handle these when these witnesses come  
3 up, I think it would be much better to have it done before  
4 trial, so have you ever -- well, that's what you need to look  
5 at, whether you've given the City a summary of, for example,  
6 of what Mr. Brown would say.

7 MR. JACOBSON: I'm sure we've given them a summary,  
8 Judge.

9 THE COURT: But does it include those things?

10 MR. JACOBSON: Judge, I can't tell you what --

11 THE COURT: Okay.

12 MR. JACOBSON: -- specifically. Because like the  
13 City argues, right, it only becomes relevant if the other side  
14 makes it relevant. In some cases, right? The fact that  
15 Mr. Brown witnessed the interaction between Ms. Sprenger and  
16 Ms. Clark only becomes relevant if Ms. Sprenger is allowed to  
17 testify. It only becomes relevant if that matter is in the  
18 trial. I mean, we're talking about years of interaction  
19 between dozens of witnesses.

20 THE COURT: Right. What about Chris Conger? I'm  
21 looking at the bottom of page 4.

22 MR. JACOBSON: Sorry, Judge, we're on motion in  
23 limine No. 9?

24 THE COURT: Document 151, No. 6. The following  
25 witnesses should be precluded because they had no personal



1 involvement and their testimony would be hearsay. So I guess  
2 many these City employees, fire department employees were not  
3 deposed probably. And whether or not you gave a summary of  
4 what you anticipated --

5 MR. JACOBSON: Judge, even if I deposed them on  
6 these issues, you know, -- in other words, -- Judge, I have  
7 outlined what I anticipate these people to testify to.

8 THE COURT: So you're saying -- I mean, some of the  
9 objections are foundational, but you're saying you feel you  
10 can meet the adequate foundational grounds?

11 MR. JACOBSON: Yeah. Yeah, if I can't -- if I  
12 can't -- if I can't establish foundation it's not coming in,  
13 period. I'm clearly aware of that rule. And that's --

14 THE COURT: So they are raising some of those issues  
15 now. Now would be a better time to resolve these issues than  
16 in the middle of a trial where we have Mr. Campbell being  
17 sworn in as a witness. And the City saying, for example, he's  
18 expected to testify -- I'm just looking at their motion, the  
19 bottom of page 4 of Document 151: Defendants claim he has no  
20 personal involvement in any of these decisions. Lacks  
21 foundation to testify about the City's policy regarding its  
22 employee taking leave for depositions related to personal  
23 matters.

24 MR. JACOBSON: I have six paragraphs in my  
25 responsive document on page 162 about his direct knowledge of

1 things.

2 THE COURT: Well, let me do this: Let me take a  
3 look at what both sides have filed and see if I need more  
4 information or if I have sufficient briefing to rule on this  
5 pretrial. Because some of this may depend on how the trial  
6 develops and how relevant -- but you are saying, Mr. Jacobson,  
7 you can establish adequate foundation?

8 MR. JACOBSON: Yes.

9 THE COURT: And it wouldn't be hearsay. People just  
10 coming in and saying this is how things are.

11 MR. JACOBSON: For example, Mr. Critchley told  
12 Mr. Campbell specifically regarding the 150 pay issue that the  
13 reason -- I'm sorry -- Mr. Campbell interacted with the fire  
14 chief about why Carrie was placed in an assignment to work  
15 across the hallway from the HR director, in that specific  
16 location. And Mr. Critchley, Fire Chief Critchley told  
17 Mr. Campbell the reason why she's there is because they needed  
18 to keep an eye on her. So that's not hearsay. That's, you  
19 know, -- he has direct knowledge of that statement.

20 THE COURT: So let me take that whole issue then to  
21 these various witnesses under advisement.

22 MS. SAAVEDRA: Your Honor?

23 THE COURT: Yes, Ms. Saavedra.

24 MS. SAAVEDRA: All I want to say because I know  
25 you're going to take it under advisement, the City's motion in

1 limine I used the verbiage from plaintiff's joint report. If  
2 you compare what I'm asking to preclude, it's the language  
3 that they used in the joint report. That's what I addressed  
4 in my motion in limine.

5 The things I'm bringing up today are things that  
6 were then brought up in response to my motion in limine that  
7 we had no notice of. So there are two distinct things here:  
8 the City is moving to have things we knew about precluded  
9 versus now we want to preclude additional things he's saying  
10 they're going to testify to. So I would just remind the court  
11 that's what we're dealing with.

12 THE COURT: Yes. Okay. All right.

13 And then testimony of psychologist Patricia Haynes.  
14 Plaintiff has listed Dr. Haynes as a witness, expected to  
15 testify about the treatment of plaintiff and the therapy  
16 sessions. So is that what you're planning on doing,  
17 Mr. Jacobson?

18 MR. JACOBSON: Well, Judge, I think the City is  
19 correct here, you know, in terms of -- in terms of the fact  
20 that we didn't disclose -- we didn't provide HIPPA  
21 authorization and we did not disclose those documents. I  
22 don't have them myself so, I mean, I think in that regard I  
23 think the City is correct. Unless the Court orders -- unless  
24 the Court orders us to, you know, produce that during this --  
25 extended discovery phase, I don't think we met our requirement

1 there. I concede on that point. That was fair.

2 THE COURT: That was just an oversight? You don't  
3 have to tell me why.

4 All right. Let me take another look, but I'm  
5 inclined to sustain the defense objection. Do you want to be  
6 heard further on that precluding Dr. Haynes?

7 MS. SAAVEDRA: No, your Honor.

8 THE COURT: Okay.

9 MS. SAAVEDRA: I believe we have two more to  
10 address.

11 THE COURT: We have plaintiff and husband spousal  
12 privilege issue.

13 MR. JACOBSON: Fundamentally, Judge, we didn't  
14 disagree with that. We thought it was too broad the way it  
15 was proposed to us during the meet and confer period. I  
16 believe that it should be essentially a question-by-question  
17 basis. If it was something that we objected to during  
18 deposition practice and something that the Court ruled on was  
19 spousal privilege, we're not going ask those questions.

20 THE COURT: So you're saying there could be some  
21 conversations that would not fall within the spousal  
22 privilege?

23 MR. JACOBSON: Yes, because as the Court ruled, if  
24 those conversations were held in the presence of third parties  
25 or --

1 THE COURT: Right.

2 MR. JACOBSON: -- or disclosed to other people, then  
3 yes. And in fact, that was the Court's order.

4 THE COURT: I distinctly remember that. I mean,  
5 obviously if these are conversations in the presence of other  
6 people, there's no privilege.

7 Yes.

8 MS. WATERS: So, your Honor, our motion in limine is  
9 designed specifically to address not those communications.

10 THE COURT: Right.

11 MS. WATERS: That we agree and that the Court  
12 indicated previously are not privileged. Our concern is with  
13 the disclosure during trial of conversations that do not fall  
14 into that category but that do actually fall under the heading  
15 of a legitimate spousal privilege. So there were a number of  
16 specific incidences, communications or questions that this  
17 Court did address in an order on spousal communication.  
18 However, in addition to those specific communications, what  
19 this Court did with its order is it clearly delineated those  
20 kinds of conversations that were simply between spouses versus  
21 the kinds of conversations that were no longer privileged  
22 because they've been divulged to third parties.

23 So the City concern is not with the later, it's with  
24 the idea that plaintiff and her husband might try to testify  
25 to the former; that is to say, a communication between just

1 the two of them that might cover a topic not specifically  
2 considered by this Court but that falls under the heading of  
3 the kinds of communications that plaintiff worked vehemently  
4 to prevent the City from inquiring about even when it was  
5 material and relevant to her claims. So we're just making  
6 sure we're not suddenly going to be hearing about  
7 communications that actually are privileged whether covered by  
8 the order or not.

9 THE COURT: You wouldn't do that, would you,  
10 Mr. Jacobson?

11 MR. JACOBSON: I can't think of anything  
12 specifically that would come up in that regard. We've briefed  
13 this with the Court and -- and, again, substantively I agree  
14 with defendant's position. In fact, I might say we violently  
15 agree on that position.

16 THE COURT: Not violently. Enthusiastically.

17 MR. JACOBSON: It's a joke.

18 THE COURT: I'm going to grant that motion in  
19 limine.

20 MR. JACOBSON: I just thought that it should be  
21 handled on a question-by-question basis. In other words, if  
22 something comes up -- I mean, we agree to that stuff, but  
23 if --

24 THE COURT: Well, let me know. If something --

25 MR. JACOBSON: I'll withdraw that. We agree.

1 MS. WATERS: Just to clarify, your Honor, for  
2 purposes of not prejudicing, confusing the jury, making a mess  
3 of the transcript, I'm going to suggest that if the plaintiff  
4 or her husband is about to discuss a marital communication, it  
5 should be handled at sidebar before the question is asked,  
6 before any kind of answer is given. We should not be placed  
7 in the position of having to object in front of the jury on an  
8 issue we dealt with before trial.

9 THE COURT: Absolutely.

10 MR. JACOBSON: As long as I'm aware of it, Judge.  
11 If something -- I agree completely.

12 THE COURT: Well, talk to your client and her  
13 husband.

14 MR. JACOBSON: She's here and she's hearing it, but  
15 there's a lot going on.

16 THE COURT: So I will grant that portion of the  
17 motion in limine.

18 What else do we have?

19 MS. SAAVEDRA: Still have City's motion in limine  
20 No. 5 and we still have Austin Clark's pediatrician that we  
21 haven't addressed. Also 6 and 7.

22 THE COURT: Carrie Clark's testimony about an  
23 alleged -- No. 5 -- an alleged note put on a door at  
24 Station 6. So you want to preclude that whole incident?

25 MS. SAAVEDRA: Your Honor, let me put some context

1 to this. We're not moving to preclude the note itself or the  
2 fact that there was a note or the content of the note. It  
3 said "Carrie Clark." What we're seeking to preclude is the  
4 statement that was made by Bob Barton to Captain L'Heurux  
5 during his interview where Bob Barton expressed an opinion  
6 about this note based on what -- he didn't personally see the  
7 note. Bob Barton did not personally see the note. He based  
8 this opinion to Captain L'Heurux on what Matt Larsen saw,  
9 what Matt Larsen allegedly heard from TFD employees that were  
10 there at Station 6 at the time the note was there, and then  
11 what Matt Larsen's response to those employees were.

12           It was an opinion that Bob Barton provided to  
13 Captain L'Heurux, and then he asked L'Heurux if he agreed  
14 with that, if there would be an uncomfortable issue for Carrie  
15 Clark, and Captain L'Heurux agreed with Bob Barton's opinion.  
16 We're asking that those statements be precluded because  
17 they're based upon hearsay upon hearsay, things other people  
18 said and he heard about from other people. And plaintiff has  
19 used these comments in the -- in the dispositive motion part  
20 of this trial to insinuate that the City then somehow had  
21 knowledge she was going to be dealing with this uncomfortable  
22 situation at Station 6 and we should have done something  
23 about. That's what we're asking to preclude. Not the content  
24 of the note itself, the fact that it was there. They're going  
25 to testify about that. That's not what we're asking be



1 precluded. We're asking that the opinion of Bob Barton and  
2 then L'Heurux's agreement with that opinion be precluded.

3 THE COURT: Mr. Jacobson.

4 MR. JACOBSON: I don't see -- I don't see the  
5 evidentiary problem with Mr. L'Heurux testifying to his  
6 opinion of that. I mean, it's the effect on the listener. So  
7 even if it's a hearsay statement, it's not offered for the  
8 truth. The truth is coming in obviously. The note was there.  
9 It did say her name on it. So it is being offered for the  
10 effect of the listener which is Mr. L'Heurux who is the  
11 scheduler.

12 THE COURT: Why is it relevant?

13 MR. JACOBSON: Because he was the one who was  
14 scheduling Ms. Clark to work at certain stations. He was the  
15 one who was aware. Who was the one -- Mr. L'Heurux was the  
16 one who said, well, I don't think she deserves any kind of  
17 special accommodations very early on.

18 THE COURT: But how is it relevant -- are you saying  
19 that impacted his scheduling?

20 MR. JACOBSON: Yeah.

21 THE COURT: Once he heard Mr. Barton?

22 MR. JACOBSON: Well, that's what I would pursue.

23 THE COURT: Well, did you pursue that in a  
24 deposition? You want to pursue it at trial?

25 MR. JACOBSON: I don't remember -- I don't remember

1 if I pursued -- we did not depose Mr. L'Heurux.

2 THE COURT: So you're just kind of speculating that  
3 maybe because he received this -- Mr. Barton made these  
4 comments, that that effected what Mr. L'Heurux did with your  
5 client?

6 MR. JACOBSON: Yeah. Yeah. And if it didn't, I  
7 mean, if it didn't, it didn't. Right? If Mr. L'Heurux gets  
8 up and testifies it had nothing to do with his scheduling,  
9 then I live with that testimony.

10 THE COURT: Well, why can't we have that figured out  
11 before trial?

12 MS. SAAVEDRA: Your Honor, may I add to that?

13 THE COURT: Yes.

14 MS. SAAVEDRA: This note appeared on the door when  
15 they were putting locks on Station 6 because that's where  
16 Carrie was being assigned. Captain L'Heurux did not provide  
17 any assignments after this note appeared, so that's incorrect  
18 to say it's somehow related to the assignments.

19 And secondly, plaintiff, in response to my motion in  
20 limine, stated that Captain L'Heurux should be able to  
21 testify about a note he saw. Well, he in fact did not see the  
22 note. Neither one of them saw the note. It's completely  
23 speculative.

24 THE COURT: Go ahead.

25 MR. JACOBSON: I understand, Judge.

1 THE COURT: And again, things may change, but at  
2 this point I'm going to sustain -- or, grant that motion in  
3 limine relating to the note on the door.

4 MR. JACOBSON: So just so I'm clear, Judge, because  
5 the way it was presented in the motion in limine was that --

6 THE COURT: The note can come out. The fact that  
7 there was a note on the door with your client's name on it.  
8 But the fact that Bob Barton made a comment, it just doesn't  
9 seem to be relevant to the case.

10 MR. JACOBSON: The interaction between Barton and  
11 L'Heurux.

12 THE COURT: Right.

13 MR. JACOBSON: That's fine.

14 THE COURT: It just doesn't seem from what I heard  
15 so far that that's relevant in this trial. Again, things can  
16 change. But at this point I'll grant the defense motion in  
17 limine as to the testimony of Bob Barton about the note to  
18 Rick L'Heurux.

19 There's no issue about claimed retaliation against  
20 Captain Clark. Plaintiff's husband is not a party to this  
21 case. That issue is moot.

22 MS. WATERS: So I think we're on to motions in  
23 limine 6 and 7 which --

24 THE COURT: Right.

25 MS. WATERS: -- were included in a single motion

1 because both stem from this Court's order on summary judgment.

2           And if I might briefly preface that by saying our  
3 big concern in this case is the introduction to the jury  
4 through testimony or even just questions about extraneous  
5 issues that this Court has already disposed of that run the  
6 risk of prejudicing the jury or that are designed to elicit  
7 sympathy or just to confuse the issues. So what we're aiming  
8 for with motions in limine 6 and 7 is to make sure that what  
9 gets presented to the jury is strictly related to the claims  
10 that are still pending and that extraneous information is not  
11 introduced that would add confusion or chaos to the decisions  
12 that they have to make.

13           So it does appear that plaintiff has agreed with  
14 motion in limine No. 6 with respect to any allegation about  
15 retaliation against plaintiff's husband. So --

16           THE COURT: Is that right, Mr. Jacobson?

17           MR. JACOBSON: Yeah, Judge. That's fine.

18           MS. WATERS: So we certainly accept that concession.

19           Nowhere is our concern about extraneous matters  
20 being introduced more prevalent than with respect to  
21 Captain Langejans. So as we indicated -- and our concern here  
22 is about defining the exact parameters of what can and can't  
23 be introduced with respect to Captain Langejans and the  
24 allegations related to him. So our understanding from the  
25 Court's order is that plaintiff will be allowed to claim that

1 she was retaliated against because she made a complaint  
2 against Captain Langejans, and the alleged retaliation is  
3 limited to her educational counseling, and that she was  
4 involuntarily transferred from fire prevention which stripped  
5 her of seniority.

6           It's our understanding that Captain Langejans'  
7 testimony is related to those two specific retaliatory acts  
8 and not related to any of the underlying claims that led  
9 plaintiff to make her complaint. So that is to say I think  
10 that plaintiff is entitled to ask whether she made a complaint  
11 about Captain Langejans. If she's allowed to ask that, I  
12 believe the City has to be allowed to ask whether the  
13 complaint was sustained. And other than that, nobody should  
14 be going into detail about the nature of the complaint, the  
15 basis for the complaint, otherwise we spend enormous trial  
16 time going into the collateral issue about a complaint and the  
17 basis thereof that this Court has already disposed of.

18           THE COURT: Mr. Jacobson.

19           MR. JACOBSON: The last part I disagree with. They  
20 had me agreeing up until that very last part. I think that  
21 Ms. Clark should be allowed to testify to the reasons why she  
22 lodged the complaint.

23           THE COURT: Would this be -- what -- give me a  
24 little summary.

25           MR. JACOBSON: Things that Mr. Langejans said about

1 her, things that -- the way she was being treated by  
2 Captain Langejans in the workplace, you know, some -- I would  
3 say some fairly serious allegations. I don't intend on  
4 getting into the truth of that. I don't intend on exploring  
5 much about it, just what was the nature of the complaint and  
6 why did you complain? Was there an investigation and what did  
7 that investigation yield? I mean, I think those are proper  
8 questions. I'm not interested in a mini-trial over whether or  
9 not those things were true or not because the Court's excluded  
10 that in summary judgment.

11 THE COURT: So what was the result of the  
12 investigation?

13 MR. JACOBSON: The result of the investigation was  
14 that it was unfounded, and Ms. Clark was given an educational  
15 counseling.

16 THE COURT: So then all that would come out.

17 MR. JACOBSON: The educational counseling would.  
18 That was part of the order.

19 THE COURT: And that it was unfounded.

20 MR. JACOBSON: Yes. Absolutely.

21 THE COURT: So, now the City wants to limit it to  
22 the two specific retaliatory acts, the counseling and the move  
23 from fire prevention.

24 MR. JACOBSON: That's fair. That's fair. I agree  
25 with that.

1 THE COURT: The loss of seniority.

2 MR. JACOBSON: I agree with that, Judge. That's  
3 fair because that's what your order outlined in 131.

4 THE COURT: So the hostile work environment, I mean,  
5 your client wouldn't be going into all those details.

6 MR. JACOBSON: Not at all.

7 THE COURT: As background.

8 MR. JACOBSON: Not at all. That would be a patent  
9 violation of the Court's order. But I think she should be  
10 allowed to testify as to the nature of why she filed the  
11 complaint. What her complaint was about.

12 THE COURT: And then if she does that, then the City  
13 would be able to bring out that it was unfounded.

14 MR. JACOBSON: Yes. Absolutely.

15 THE COURT: And then we'd move on? Would that work?

16 MS. WATERS: I don't think so, your Honor. And this  
17 goes really to the core of our concern and the reason why we  
18 filed the motion in limine. In order for plaintiff to  
19 establish the elements of her claim as a legal matter, all she  
20 needs to be able to show the jury is that she filed a  
21 complaint.

22 THE COURT: Right.

23 MS. WATERS: And that contemporaneous with the  
24 filing of the complaint or shortly thereafter she experienced  
25 adverse employment actions that she claims are retaliatory.

1 The basis for her complaint is not material in any way  
2 whatsoever. But introducing that evidence is highly likely to  
3 confuse the jury, to prejudice the jury against the City.  
4 It's inappropriate. And if plaintiff is allowed to do it,  
5 then we are forced to go through the entire -- there was an  
6 investigation, and it was found unfounded, and we do end up  
7 having a mini-trial because we can't be put in the position of  
8 being concerned that a juror in the box is going to find  
9 against us for acts that aren't actually part of plaintiff's  
10 remaining claims.

11 So in terms of actually being able to prove the  
12 elements of her case, she only needs to be -- she only needs  
13 to be allowed to tell the jury that there was a complaint  
14 filed. And for purposes of fairness and completion, the City  
15 should be allowed to then elicit the limited testimony that  
16 the complaint was unfounded.

17 And to clarify, your Honor, the educational  
18 counseling, and this may have just been a little bit of a  
19 misspeak, but so we don't confuse the issues the educational  
20 counseling that Ms. Clark received was not for filing an  
21 unfounded complaint. It was for a separate issue but does  
22 comprise part of her retaliation claim for the filing of the  
23 complaint itself.

24 THE COURT: All right. So I am inclined to grant  
25 that motion in limine and preclude plaintiff from talking



1 about the underlying complaint that Ms. Clark filed against  
2 Captain Langejans.

3 MS. WATERS: Langejans.

4 THE COURT: Langejans.

5 MR. JACOBSON: And that's fine, Judge. I just ask  
6 that the Court instruct counsel not to essentially argue --

7 THE COURT: Yeah.

8 MR. JACOBSON: -- well, we don't know what that  
9 complaint was about, or essentially she was a whiner or a  
10 complainer about this stuff, and she filed frivolous  
11 complaints. Because that would be inappropriate given that we  
12 weren't allowed to discuss the nature --

13 THE COURT: Right. Of course.

14 MR. JACOBSON: -- of it.

15 THE COURT: And so that way neither side will  
16 characterize it.

17 And if you want me to give the jury an instruction  
18 during trial it's just not relevant, I can certainly do that.  
19 It's just a steppingstone to this cause of action, but it's  
20 not relevant and don't speculate.

21 And do you mind if we allow the jurors to ask  
22 questions during trial? I know it's required in state court,  
23 but in federal court it's not. I mean, I normally allow it if  
24 both sides agree. It's kind of an interesting way to see into  
25 the minds of the jury during trial.

1 MR. JACOBSON: I always liked it, Judge, when we did  
2 our criminal trials and the jurors were allowed to ask  
3 questions.

4 THE COURT: Any objection?

5 MS. WATERS: Your Honor, the City is amenable to it.  
6 I imagine we'll spend a lot of time saying we're not allowed  
7 to tell you that. But I do also find it interesting and it  
8 gives us a small amount of feedback.

9 THE COURT: As long as we don't get one incredibly  
10 prolific juror who decides he or she is also counsel and needs  
11 to get actively involved.

12 All right. So I will grant motion in limine he  
13 reagent -- the defense motion in limine related to Captain L.

14 Oh, testimony pertaining to the plaintiff's son's  
15 medical treatment. So defense is requesting that that not be  
16 allowed.

17 MS. SAAVEDRA: Yes, your Honor. If I may address  
18 that?

19 We filed our motion in limine originally to just  
20 address the fact that Austin Clark's health itself was not  
21 relevant to this trial because it's a nonissue. The City  
22 never had knowledge that he was experiencing health problems.  
23 Carrie Clark never brought that to anyone's attention at TFD  
24 or the City. There's no claim related to his health problems.  
25 So we originally brought the motion in limine to preclude him

1 from testifying about those things because they're just not  
2 relevant to the issues in the case or the issues that the jury  
3 is going to be asked to decide.

4 In filing that motion, we now discover that  
5 plaintiff wishes to call this doctor to now testify about all  
6 the things that he originally was going to use nurse Noreen  
7 Carver to testify about. And I don't know if your Honor  
8 remembers, at the status conference the City raised it would  
9 be filing a motion in limine in regards to Noreen Carver  
10 because she was not disclosed as an expert pursuant to the  
11 rules.

12 When we brought that to plaintiff's counsel  
13 attention, he conceded and withdrew her as a witness, but now  
14 apparently plaintiff is going to attempt to slide in these  
15 opinions that were originally going to be Nurse Carver's  
16 opinions by asking plaintiff's son treating physician. Now,  
17 he's never been disclosed as an expert. He's only ever been  
18 disclosed to testify about Austin Clark's health issues and to  
19 testify consistent with the medical records that were provided  
20 by him. Nothing in those records reference anything about  
21 engorgement, mastitis, or any medical issues related to  
22 breasts. He's never been disclosed to testify about any of  
23 the things that plaintiff included in his response to our  
24 motion in limine. The City has never been under the  
25 impression that Mrs. Clark was claiming any medical issues in

1 regards to her breasts.

2           And as a result of that, your Honor, the parties  
3 agreed that they would not bring up her breast augmentation  
4 surgery during the trial because it was not relevant. One of  
5 the things I just want to bring to the Court's attention is if  
6 she's now going to claim that she had some medical issues in  
7 regards to her breasts, that then opens up the door and the  
8 City would like to withdraw that stipulation because it does  
9 open up the door to go into what effect, if any, that would  
10 have on her ability to produce milk or breastfeed her son.

11           Again, it's very difficult for the City to address  
12 the responses in the motion in limine off the hand here  
13 because these are issues we didn't know existed until we saw  
14 the responses. But we've never been put on notice that this  
15 doctor was going to speak to any of these opinions put forth  
16 in his response, your Honor.

17           THE COURT: All right. Mr. Jacobson.

18           MR. JACOBSON: Well, Judge, first of all, the  
19 concept that Austin's health is not relevant in this case is  
20 ridiculous. It is directly material and relevant to  
21 Ms. Clark's state of mind. It's directly relevant and  
22 material to precisely why she was so concerned. It goes to  
23 damages in this case because Austin's medical condition  
24 exacerbated her stress about having stations and the reason  
25 why she was -- the very reasons why she was as adamant about

1 having a legally compliant lactation space.

2 The City did know about it. Did know about Austin  
3 Clark's medical conditions. Ms. Clark wrote a lengthy e-mail  
4 to Paul McDonough about Austin's medical conditions after one  
5 of her appointments so that's not a true statement. And  
6 essentially, we're not offering him as an expert. We're  
7 offering him to testify as to his personal knowledge about the  
8 records and about his -- about his knowledge of his treatment  
9 of Ms. Clark. And we are not using him as some sort of  
10 end-around for an expert. He's not offering global expert  
11 testimony. He's offering testimony about precisely what his  
12 experience was treating Austin, and, so, for example, what are  
13 some of the causes based on your training and experience.  
14 What could be some of the causes of --

15 THE COURT: Isn't that expert testimony?

16 MR. JACOBSON: What?

17 THE COURT: Isn't that expert testimony? Testimony  
18 that would intend to inform the jury that's outside the normal  
19 scope of knowledge from an expert, a doctor, even though he's  
20 also a treating doctor. He's going to give -- is he going to  
21 give an opinion that the -- what opinions -- have those been  
22 disclosed?

23 MR. JACOBSON: Other than what's in the medical --  
24 other than -- other than what's in the medical records and  
25 that he's going to testify to his treatment of Austin, I don't

1 believe they have been, Judge.

2 THE COURT: So he would opine that as a result of  
3 Ms. Clark's inability to pump breast milk, that the child  
4 suffered healthwise? Something like that?

5 MR. JACOBSON: Yes, yes.

6 THE COURT: So he's going to make that direct link?

7 MR. JACOBSON: Yes.

8 THE COURT: And is that in the medical records?

9 MR. JACOBSON: His weight loss is, Judge. I'm not  
10 sure, I'd have to go back through the precise records and see  
11 exactly what he wrote on any given day because those --  
12 they're pretty voluminous records. I don't remember if he  
13 said --

14 THE COURT: So he's going to say the lack of weight  
15 gain of the child is directly related to your client's  
16 inability to adequately pump --

17 MR. JACOBSON: Yeah, if -- yes, because these are  
18 things that he told -- that Ms. Clark told him during his  
19 treatment of -- why is he under weight? Well, I'm having  
20 trouble feeding.

21 THE COURT: Was this baby also being bottle-fed at  
22 the same time?

23 MR. JACOBSON: At some point in time he was  
24 bottle-fed. He was supplemented. Yeah, he was being  
25 supplemented with formula. He couldn't tolerate the formula

1 so he had -- he had all sorts of health issues related to  
2 being able to get adequate nutrition early on.

3 THE COURT: Well, you know what? It's noon and I  
4 have a noon meeting. Sorry to say. So do you want to come  
5 back this afternoon and we can further discuss -- because I  
6 don't want to rush into this. I want to give both sides an  
7 opportunity to discuss further.

8 MR. JACOBSON: Does the Court have further questions  
9 about it? I mean, I will agree to limit -- I will agree not  
10 to have Dr. Radomsky testify to anything that would be  
11 considered an expert opinion outside of the scope of his  
12 treatment.

13 THE COURT: I guess I need to know a little more  
14 about that.

15 MS. SAAVEDRA: Your Honor, we do want to say some  
16 more. It seems as though we have a disagreement about what an  
17 expert opinion is, and we should get this clarified before we  
18 go to trial.

19 THE COURT: All right. I have a 2:00. Are counsel  
20 available at 2:30?

21 MS. SAAVEDRA: Yes, your Honor.

22 THE COURT: Mr. Jacobson?

23 MR. JACOBSON: I will make myself available.

24 THE COURT: Great. Because it's all fresh in our  
25 minds, so let's keep going. So let's have you come back at

1 2:30 and we can discuss further the motion in limine.

2 Thank you. We'll stand at recess.

3 (Proceedings recessed at 12:01 p.m.)

4 (Proceedings commenced at 2:30 p.m., as follows:)

5 THE COURT: No, we can just say we're back on the  
6 record. Counsel is present. Ms. Clark is present. I'll give  
7 you a chance to set up here.

8 So I think the last thing we were discussing was the  
9 testimony of the doctor for Ms. Clark's son and what the  
10 parameters of that testimony would be and if that person's a  
11 fact witness or an expert. So first, let me look to see  
12 what's in the pretrial statement about -- the pretrial order  
13 about that.

14 All right. That's on page 9 of the pretrial order.  
15 I don't have the docket number here. This is Dr. Radomsky, is  
16 that who we were talking about?

17 MR. JACOBSON: Yes, Judge.

18 THE COURT: He's expected to testify regarding his  
19 treatment of Austin, his observations of Austin's health  
20 during Austin's first year of life, his assessments and his  
21 directions to plaintiff regarding her feeding of Austin.

22 City's objections: Not relevant, confuses or  
23 misleads the jury in this matter. There is no evidence anyone  
24 at TFD knew or should have known of any medical treatment  
25 Austin received, his health condition or any directions



1 plaintiff was allegedly given regarding the feeding of Austin.  
2 Regardless, this evidence is irrelevant to the legal issues  
3 and/or alleged damages in this matter.

4           So let's see, was it you, Ms. Waters -- no,  
5 Ms. Saavedra was talking about that. So go ahead.

6           MS. SAAVEDRA: Yes, your Honor. So I wanted to  
7 start off with plaintiff averring to you that this doctor was  
8 going to testify to the causal link between Austin Clark's  
9 underweight and the plaintiff's alleged stress that she  
10 suffered as a result of what she's alleging in this case. I  
11 did bring copies of the medical records which consists of  
12 86 pages. I did go through so I could highlight for you  
13 which pages actually pertain to the time frame that's relevant  
14 to this case.

15           If you recall, plaintiff is alleging -- she's  
16 admitted that from October 2013 to December -- I'm sorry,  
17 October 2012 to December 2012 she was assigned to Station 12.  
18 So the issue in this trial is was she assigned to stations or  
19 was she worried that she was going to be assigned to stations  
20 that were not adequate between the time frame of January 2013  
21 to March of 2013. Because if you recall, she was assigned to  
22 Station 6 after that. So it's a very limited time period that  
23 we're talking about.

24           If you go through and look at these medical records,  
25 there's very limited amount of these records that are relevant

1 to that point in time. I even went back to include the time  
2 from the time he was born, which was July 19th of 2012 up  
3 through April 18th of 2013. And I would like to supplement  
4 the record with this as an exhibit, and we can file it later  
5 on, your Honor, to make sure it's an exhibit in the docket.  
6 But I do have a copy for plaintiff as well as you, your Honor.  
7 Would you like me to give that to you now?

8 THE COURT: Sure. I could take a look.

9 MR. JACOBSON: Judge, I might be able to -- I might  
10 be able to resolve some of the concerns here.

11 THE COURT: Okay. Go ahead.

12 MR. JACOBSON: I reviewed -- I went back and I  
13 reviewed the City's objections to -- and analysis of what I  
14 had proposed in its response to the motion in limine what  
15 Dr. Radomsky would be testifying to and I see their point. So  
16 what I would propose is to limit Dr. Radomsky's testimony to  
17 the records that were provided to the City in this case: his  
18 treatment of Austin, his recollection of treating Austin,  
19 anything surrounding that.

20 But in terms of establishing any kind of causal link  
21 to his treatment, there's nothing in the records so I don't  
22 anticipate there being any testimony to it. All the stuff  
23 about mastitis and engorgement, not going to go into.

24 THE COURT: So why do you think that's relevant, the  
25 health of your -- what is the doctor going to say? He was in

1 poor health? He was underweight?

2 MR. JACOBSON: So plaintiff went back to work on  
3 October 27th, 2012. During his November 5th visit, so the  
4 very first visit, approximately nine days after Carrie goes  
5 back to work, Dr. Radomsky's note indicates he has been more  
6 fussy lately. He always seems to be wanting to eat. He will  
7 occasionally arch with his feet -- feeds. He does not spit up  
8 at all. He seems to be fussy if he is not eating or sleeping.  
9 Things have worsened over the past week. He is passing green  
10 colored-foamy stools. So, in other words, his condition had  
11 worsened in the week prior to that November 5th doctor's visit  
12 which coincides with when Carrie went back to work at TFD and  
13 all the stress associated with it.

14 So, you know, I expect Carrie to testify that her  
15 difficulty regularly expressing breast milk and the stress she  
16 was having over not knowing whether she was going to be  
17 assigned to a station that was compliant contributed to  
18 Austin's weight loss or inability to gain the weight that a  
19 pediatrician thinks he should be gaining.

20 THE COURT: Was he underweight --

21 MR. JACOBSON: Yes.

22 THE COURT: -- before she went back to work?

23 MR. JACOBSON: No.

24 THE COURT: Is that in the records?

25 MR. JACOBSON: Well, there's nothing in the records

1 that say he was under weight.

2 THE COURT: Would there be? I mean, in other  
3 records subsequent, does it say he's underweight?

4 MR. JACOBSON: Yes, yes.

5 THE COURT: Don't they always say the weight?

6 MR. JACOBSON: So in the records that you have  
7 before you, for example, in the November -- give me a second.  
8 On the November -- so on the December 17th, 2012 record, he's  
9 diagnosed as underweight. November 27th, 2012 he's diagnosed  
10 as underweight. November 5th he was not diagnosed as  
11 underweight, but he was noted as having conditions worsened.  
12 The assessment was inadequate calories versus other potential  
13 causes. The previous visit to that, August 10th mentions  
14 nothing about being under weight or having inadequate  
15 calories.

16 THE COURT: When does the doctor's note again  
17 reflect that he has normal weight?

18 MR. JACOBSON: Well, again, I don't think that there  
19 is -- I don't think that there is any -- any note that says  
20 that his weight is now normal.

21 THE COURT: Like here, I'm looking at 11-16 of 2012.  
22 It says -- by then your client had gone back to work?

23 MR. JACOBSON: Yes, Judge.

24 THE COURT: It says nutrition, feeding success,  
25 weight gain, feeding choices, human guidance. So I don't

1 know. Anticipatory guidance, exam findings.

2 MR. JACOBSON: Sorry, Judge, what --

3 THE COURT: Oh, I was looking at 11-16-2012. I just  
4 pulled that up. Diet appropriate and content volume for age  
5 at the well visit. Then I'm looking at anticipatory guidance.  
6 Well four-month-old, allergic colitis likely secondary to milk  
7 soy protein. We discussed continuing to avoid milk and soy in  
8 mom's diet. If things do not improve in the next a couple of  
9 weeks, we'll consider a gastroenterology evaluation.

10 Discussed growth and development. Normal.

11 I don't know, I just think that introducing this  
12 type of testimony, I'm just wondering why it would be  
13 relevant. I'm just looking at one note, for example, that  
14 says that the child is -- may have allergic colitis. We  
15 discussed continuing to avoid milk and soy in mom's diet. I  
16 don't see anything here that says -- is there anything in  
17 these records that says because she's unable to get the proper  
18 accommodations where she works, that that's affecting the  
19 child? Or is that summarized in any of these notes?

20 MR. JACOBSON: No, and that's not his testimony.

21 THE COURT: Okay.

22 MR. JACOBSON: His testimony is that he did -- he  
23 did treat Austin and Austin was under weight.

24 THE COURT: Show me the note for that. Because I'm  
25 looking at a note, 11-16 of '12 that shows that the child was

1 a well four-month-old.

2 MR. JACOBSON: Look at Clark, on the bottom right,  
3 Clark 1143.

4 THE COURT: That's right. I could have told you  
5 the page number. Clark-1163 is what I was looking at.

6 MR. JACOBSON: And then you want to look at Clark  
7 1142.

8 THE COURT: Clark 11- --

9 MR. JACOBSON: So 1141, 1142, and 1143.

10 THE COURT: Okay. That's for 12-17 of '12, so that  
11 would have been a month later. Under weight. Mom changes to  
12 her diet. Vital signs. Patience was seen as a nurse visit  
13 and not by the physician. Chart reviewed by me. So let's see  
14 what that says. Here for weight check. He is breastfed and  
15 has started on ranitidine. For Cheryl, r-a-n-i-t-i-d-i-n-e.  
16 Mom has stopped dairy and soy.

17 Okay. I'm looking at 11-5-12. That's the same  
18 weight. Is that page 1143?

19 MR. JACOBSON: Yes, in the middle under assessment,  
20 Judge.

21 THE COURT: Fussy baby. Question, inadequate  
22 calories versus GER versus milk protein intolerance versus  
23 sleep issues. I spent 25 minutes with the patient and his  
24 mother, greater than 50 percent of which was spent in  
25 counseling. That was with the doctor.

1           So tell me again what he would -- he would testify  
2 about those two notes?

3           MR. JACOBSON: Those three notes. Yeah, he would  
4 testify about his treatment of Austin. The fact that the baby  
5 was under weight. What his recollection of his meetings with  
6 Ms. Clark were. I don't know if he's going to recollect much.  
7 This was 2012. But this was a foundational issue. It also  
8 establishes that during the time right after she went back to  
9 work that the baby was, in fact, under weight. And that was a  
10 concern for her, and the fact is that they had her back for  
11 more frequent weight checks during this period of time.

12           THE COURT: All right. But you wouldn't have him  
13 testify any further than his -- this factual rendition?

14           MR. JACOBSON: That's correct, Judge.

15           THE COURT: I guess it could go -- I mean, to her  
16 stress and anxiety and make her very concerned if she wasn't  
17 already about the issues in this lawsuit which is her ability  
18 to pump her breast milk in a comfortable, appropriate  
19 environment.

20           Let me hear more from the City.

21           MS. SAAVEDRA: Thank you, your Honor.

22           Her son was actually under weight the first month of  
23 his birth, and that's noted under Clark 1145.

24           THE COURT: So he was under weight when he was born.

25           MS. SAAVEDRA: The week -- 11 days after he was born

1 he went in for a weight check, and that's the first time that  
2 this doctor notes that he is under weight. So he was, in  
3 fact, under weight before she came back to work.

4 THE COURT: Okay.

5 MS. SAAVEDRA: Moving along, there are visits in  
6 between that time frame and -- a visit for a rash. It's true  
7 he is noted as under weight on 11-27-12. He's then referred  
8 to a GI doctor on December 4th of 2012. If you want to refer  
9 to Clark 1185. And it's noted on this that his diagnosis is  
10 under weight, blood in stool, and fussy infant. No mention of  
11 breastfeeding or expressing milk issues. That's December 4th,  
12 2012. Then he goes back December 17th, 2012. Sorry,  
13 December 17th, 2012 on 1141. It's noted he's under weight.

14 This is the time period she's at Station 12. This  
15 is not the time period where she's allegedly experiencing  
16 stress because at this point in time she's not guessing where  
17 she's going to be stationed. We have a RFA where she admits  
18 she worked at Station 12, was assigned to Station 12 from  
19 October 2013 (sic) to December 2012. So these notes, even  
20 though he was under weight, are not relevant to her claims  
21 because she's not claiming she was under stress during that  
22 period of time. She's claiming she was under stress  
23 January 2013 to March 2013.

24 So if you look back at the medical records, and  
25 there is a date where he sees the doctor on January 22nd, 2013



1 ending in 1161.

2 THE COURT: That's what -- what's the Bates stamp  
3 number?

4 MS. SAAVEDRA: 1161. So here, this is the next date  
5 after the December 17th, 2012 date.

6 THE COURT: Yes.

7 MS. SAAVEDRA: And here there is no mention of him  
8 being under weight. In fact, the doctor notes that his diet  
9 is appropriate in content and volume for his age. His GI is  
10 normal. All of these notes are made on the top there,  
11 your Honor, under Well Fitness Infant. So this is during the  
12 time period that she alleges she was under stress and not  
13 knowing what station she was going to be stationed to.

14 If you turn to the next date of service is  
15 March 14th, 2013.

16 THE COURT: And that's --

17 MS. SAAVEDRA: I'm looking for that one, your Honor.  
18 The way that these were disclosed, they're not in  
19 chronological order by date, so just so you're aware of that.  
20 This one is 1139.

21 THE COURT: That was the next visit?

22 MS. SAAVEDRA: Yes. March 14th, 2013. Also during  
23 the relevant time frame. And here he's being seen for a rash.  
24 Again, no mention of being under weight. No mention of any  
25 breastfeeding or expressing milk issues. And he's just there

1 to treat lesions and rashes that he had on his body.

2 So then you have the next date of service,  
3 your Honor. That's April 18th, 2013 and that's 1159. Here  
4 he's nine months old. No concerns by the parent. She says  
5 she's still breastfeeding. Again, the doctor notes that his  
6 diet is appropriate in content and volume for his age.  
7 There's no mention of him being under weight.

8 So the relevant time period here shows that she was  
9 actually improving. Again, completely devoid of any mention  
10 that she was having issues breastfeeding or expressing milk or  
11 any mention she was undergoing stress and that resulted in her  
12 son being under weight.

13 THE COURT: So the relevant -- she was at Station 12  
14 from October of 2012 to December 2012.

15 MS. SAAVEDRA: Correct.

16 THE COURT: When Ms. Clark first started. And  
17 then --

18 MR. JACOBSON: It's not true, Judge. That's not --  
19 that's not accurate, Judge. That's factually inaccurate.

20 MS. SAAVEDRA: I have an RFA, your Honor.

21 MR. JACOBSON: Judge, she was assigned to Station 12  
22 for one tour. She also worked at station 7 once during that  
23 time. It's an inaccurate use of the word "assignment." She  
24 worked there but she wasn't assigned there. She was assigned  
25 there for one tour, but that's it.

1 THE COURT: How long is a tour?

2 MR. JACOBSON: She also worked at station 7.

3 THE COURT: How long is a tour?

4 MR. JACOBSON: Five shifts.

5 THE COURT: How long is a shift?

6 MR. JACOBSON: Twenty-four hours.

7 THE COURT: Oh, so she was only there for five days?

8 MR. JACOBSON: She was assigned there. See, it's a  
9 difference between being assigned and working there. And the  
10 difference is when you're assigned to a station, you know that  
11 that's where you're going to be. She worked there but only  
12 because there were openings at that station on those shifts  
13 available for her; otherwise, she was a swing shift paramedic  
14 and they made it clear to her that she was. So I just  
15 wanted -- I wanted to clear that up, that --

16 THE COURT: So physically, she was physically  
17 located at different places even though she was assigned to  
18 Station 12 from October of 2012 to December 2012?

19 MR. JACOBSON: No, Judge, she worked at Station 12,  
20 but it was the uncertainty of where she was going to work on  
21 any given shift. Other than those five shifts, she had no  
22 idea where she would be working.

23 THE COURT: So what do you do, show up for at work  
24 at Station 12 and then go someplace else?

25 MR. JACOBSON: Or they call you. You call in in the

1 morning. You call in the morning and say, Where am I going?

2 THE COURT: Okay. Is that how it works for  
3 everybody?

4 MR. JACOBSON: When you're on a swing shift.

5 THE COURT: Okay. And you have a stipulated  
6 statement?

7 MS. SAAVEDRA: I have an RFA where she admits she  
8 was assigned to Station 12 between those dates, your Honor.  
9 What she's going to say at trial, I don't know.

10 But moving on to the basis for my motion in limine.

11 THE COURT: Okay.

12 MS. SAAVEDRA: There is nothing in these records  
13 that is relevant to the issues in this case. And the fact  
14 that he is under weight, there is no causal link. No one can  
15 testify to the causal link. The records show that he gained  
16 weight during the time period that is relevant to her claims.

17 And I think plaintiff's counsel has conceded he's no  
18 longer going to ask this doctor to testify about the items  
19 that he represented in his response. But just for the record,  
20 he was never disclosed as an expert, nor were those opinions.  
21 And according to these records he never treated plaintiff.  
22 He's a pediatrician that treated Austin. And again, his  
23 health isn't relevant to the legal issues.

24 The issues are did we provide her with an  
25 appropriate space to lactate. And there is no allegation in

1 this case that she wasn't provided the appropriate break time,  
2 so this whole engorgement issue that is now being raised is  
3 also something new to the City.

4 THE COURT: I think he already said he's not going  
5 to raise that issue.

6 MS. SAAVEDRA: Okay.

7 MR. JACOBSON: Well, I'm not going to raise it  
8 through Dr. Radomsky, but the plaintiff can testify to her own  
9 experience.

10 THE COURT: Okay. Well, yeah, my concern -- I just  
11 think it creates so much confusion with the jury. Because  
12 once you start getting into the health of the child, the  
13 inference is that has something to do with something the City  
14 did or didn't do. And I just don't see that link; the lack of  
15 weight of the child for a certain period of time is linked to  
16 the City -- the allegations against the City. Certainly, your  
17 client can testify to how she felt and her concerns and  
18 physically how she felt and how that affected her relationship  
19 with her infant. But to have a doctor come in and start  
20 telling us about the child and his physical condition, isn't  
21 the inference going to be that that's as a result of what the  
22 City did or didn't do?

23 MR. JACOBSON: Well, it's a fact, Judge. It's a  
24 fact that he was under weight. And if the jury -- she is  
25 going to testify, plaintiff is going to testify that she was

1 under stress because of the uncertainty as to where she would  
2 work on any given shift and whether she would be able to be at  
3 a -- at a station that was legally compliant with federal law  
4 for proper lactation facility, for a proper space for her to  
5 lactate, and that that stress affected her milk production.

6 THE COURT: Is this doctor -- he didn't evaluate  
7 your client. He's not going to say it affected her milk  
8 production.

9 MR. JACOBSON: He's not going to, my client is going  
10 to say that.

11 THE COURT: So why do you need the doctor -- what is  
12 the purpose of his testimony?

13 MR. JACOBSON: He's testifying that the baby was in  
14 fact under weight during the time period. That's it.

15 THE COURT: So why is that relevant?

16 MR. JACOBSON: Well, because the under weight  
17 baby -- you know, if you are -- I just want to gather myself  
18 for a second.

19 THE COURT: No, take your time.

20 MR. JACOBSON: A mother that cares about expressing  
21 breast milk for her son and is committed to doing that and is  
22 having trouble doing so and is unable to do so which results  
23 in their being baby under weight --

24 THE COURT: Wait. How do we know that --

25 MR. JACOBSON: -- lacking calories. That's what she

1 would testify to.

2 THE COURT: Well, that's her thought. But we don't  
3 have a medical Doctor saying that's why the baby was under  
4 weight. I mean, do you --

5 MR. JACOBSON: No, you're correct, Judge. But she  
6 can certainly testify to her experience and her knowledge and  
7 her opinion.

8 THE COURT: Why can't you just have your client  
9 testify that the baby was under weight and that concerned her  
10 and that created even more stress.

11 MR. JACOBSON: I could do that, Judge.

12 THE COURT: Because if you bring the doctor in and  
13 he starts going through these records, then that's going to  
14 open the door for the City to start going through like we just  
15 did and say, What about this date? The baby was fine. And  
16 you talk about a lot of other things, like there could be lots  
17 of reasons why he's under weight.

18 MR. JACOBSON: Well, am I going -- am I going to  
19 draw a foundation objection when I show -- when I show the  
20 baby's -- when I show these medical records showing that the  
21 baby was under weight? Am I going to get a foundation  
22 objection?

23 THE COURT: How would that be relevant? I mean, I'm  
24 just thinking this isn't a medical -- this isn't that kind of  
25 a case. I'm just wondering why this would be relevant. I

1 mean, I don't think if your client testifies that the baby was  
2 under weight and your client had concerns and she was having  
3 difficulty expressing her milk, I don't think the government  
4 is going to dispute that. If there's no doctor that comes in,  
5 is the government going to the say, No, your baby wasn't under  
6 weight. Is the City intending to go down that road?

7 MS. SAAVEDRA: I had no knowledge of the child's  
8 weight. Why would we?

9 THE COURT: Pardon me?

10 MS. SAAVEDRA: The City had no knowledge of the  
11 child's weight. I don't think we have any witness that could  
12 get up and testify to whether or not he was under weight.

13 THE COURT: But as far as cross-examining Ms. Clark  
14 and saying, Isn't it true your baby really wasn't under weight  
15 and grabbing the medical records and saying look at this note  
16 and look at that note.

17 MS. SAAVEDRA: Obviously, I'm moving to preclude him  
18 and preclude the records. We wouldn't bring them up at trial.

19 THE COURT: So I don't know. I just think that by  
20 having the doctor actually come in and go through some of  
21 these notes, which he's obviously going to be doing, he may  
22 have some independent recollection, but based on what I see,  
23 Mr. Jacobson, I think the probative value under Rule 403 is  
24 outweighed by potential confusion for the jury and unfair  
25 prejudice to the City. The concern being -- well, I may



1 revisit this, but from what I've seen so far -- can I just  
2 keep a copy of these?

3 MS. SAAVEDRA: Yes, your Honor. That's a copy for  
4 you. We'll file a separate copy for the record.

5 THE COURT: Based on what I've seen as far as the  
6 timing, at this point I'm going to -- now, I don't know, I  
7 don't see any other reason that Dr. Radomsky would need to  
8 testify because I don't think he actually treated your client.  
9 So unless there's something about his testimony, Mr. Jacobson,  
10 related to your client's emotional distress or something like  
11 that, I mean, that possibly could be relevant, but I'll go  
12 ahead and grant the defense motion in limine as to  
13 Dr. Radomsky.

14 MS. SAAVEDRA: And your Honor, I'm sorry, I just  
15 wanted to add on that we're not going to bring these up unless  
16 plaintiff gets up and tries to testify to the causal link  
17 itself, then obviously we get to impeach her or cross-examine  
18 her with these records because they would then impeach what  
19 she's testifying to. So we would have to be able to let the  
20 jury hear all the other reasons he could be under weight if  
21 she's going to testify that that was the reason. It's a  
22 different thing for her to testify that he was under weight  
23 and this caused her stress or her concern and caused her  
24 additional stress. But if she takes the next step, it opens  
25 the door for her to be cross-examined on these documents.

1           THE COURT: Yeah, whether you can cross-examine her  
2 on something she didn't prepare, we can -- we can deal with  
3 that evidentiary issue if and when it arises which I don't  
4 think it will.

5           So anything else on the motions in limine?

6           MS. SAAVEDRA: Your Honor, I just wanted to briefly  
7 revisit the nondisclosure issues because the issues pertain to  
8 not just facts in evidence that plaintiff now wants to present  
9 to the jury that were never disclosed, which are those three  
10 witnesses that he's saying are comparitors, but it also  
11 extends to specific testimony that is now being proposed as  
12 testimony of witnesses. And I did bring copies of the  
13 joint -- the joint pretrial order where plaintiff set forth  
14 who was going to testify to what as well as defendant's. And  
15 I brought a copy of every single disclosure statement that  
16 plaintiff has provided. And I have a copy for the Court, I  
17 have a copy for Mr. Jefferson -- for Mr. Jacobson. Sorry, if  
18 you would like to look at it.

19           But again, these witnesses the majority of the  
20 witnesses were not disclosed until June 30th of 2017 as I  
21 mentioned before. And the contents of the disclosure I think  
22 is important for the Court to see. Since you are taking this  
23 under advisement, I think it's important to see how the  
24 witnesses were disclosed and how they were -- what plaintiff's  
25 set forth as their expected testimony. And what you'll notice

1 is he that -- it is specific enough that the City relied upon  
2 what he said they were going to testify to, what plaintiff  
3 counsel said they were going to testify. We had no reason to  
4 depose these witnesses or to seek further discovery or  
5 disclosure regarding them because we relied upon what he said  
6 they would testify to.

7           It was not until we received the responses to the  
8 motion in limine that we then learned of these other issues or  
9 these other facts they now want to be presented to testify  
10 about. And that's important because we had no notice of this.  
11 So I would like to have the plaintiff's six disclosure  
12 statements which contains most of the witnesses we're dealing  
13 with and then plaintiff's initial disclosure statement which  
14 is the one that has Sloan Tamietti on it.

15           THE COURT: All right. And do you have copies for  
16 the Court?

17           MS. SAAVEDRA: Yes, your Honor.

18           THE COURT: Do you know, Mr. Jacobson, what counsel  
19 is referring to? What Ms. Saavedra is talking about. Do you  
20 want to look at it before she hands it to me?

21           MR. JACOBSON: Sure, I'll look at it, Judge. I  
22 think I know what she's referring to. I strenuously object to  
23 this ambush. This was not raised in any motion in limine.  
24 This was not raised anywhere before this. She had plenty of  
25 opportunity before the trial was set, before discovery ended

1 to depose witnesses. I am not required to disclose every  
2 scintilla of information I intend to elicit from a witness.

3 THE COURT: Okay. Well, I'll just see. You would  
4 agree if it's a completely new arena --

5 MR. JACOBSON: Not necessarily, Judge. That --

6 THE COURT: No.

7 MR. JACOBSON: Not necessarily.

8 THE COURT: I guess it depends.

9 MR. JACOBSON: It really depends on the  
10 circumstances. You know, when they didn't disclose John  
11 Vincent anywhere, but, yet, have him show up in motions in  
12 limine, they say, well, you know, okay. Well, it was -- it  
13 was harmless error. Well, they can't have it both ways. They  
14 can't fail to produce, fail to identify a witness. I mean, if  
15 they're going to play this game, Judge, then we are going to  
16 go at it with every -- I'm going to limit or I'm going to move  
17 to limit every single one of their witnesses to the specific  
18 details of the testimony that those witnesses are going to  
19 give. If it's not in their disclosure statement, they're not  
20 testifying to it or at least that will be my position.

21 THE COURT: All right. Let me just see what the  
22 disclosure -- I'll take a look at those. And this is to which  
23 witnesses? This would be as to -- Ms. Saavedra.

24 MS. SAAVEDRA: This addresses the majority of the  
25 witnesses that the City did a motion in limine for and it's

1 motion in limine No. 9. Specifically, the initial disclosure  
2 shows Sloan Tamietti as disclosed by plaintiff. The six  
3 supplemental disclosure addresses -- I don't know how to  
4 pronounce his first name, Josue Camarena, John Valenzuela,  
5 Josh Campbell, Chris Conger, Martin "Harvey" Brown, Jon North,  
6 Brad DeCastro, Roger Tamietti.

7 THE COURT: Okay. And these folks are all listed in  
8 the pretrial, the joint pretrial order?

9 MS. SAAVEDRA: Yes, your Honor. And I think what  
10 you'll notice, I think they actually mirror each other.  
11 You'll see the way they were set forth in the joint pretrial  
12 order is similar or the same as they were set forth in the  
13 disclosure statements.

14 And as far as John Vincent goes, the reason it's  
15 harmless error that the City did not disclose him is because  
16 he was disclosed and actually twice by plaintiff. You'll see  
17 he was also disclosed in their sixth supplemental disclosure  
18 that you have in front of you. So they knew he was a  
19 potential witness in this case. And the City did disclose the  
20 e-mail, the relevant e-mail that specifically sets forth what  
21 John Vincent witnessed and what his anticipated testimony was  
22 based on that e-mail.

23 MR. JACOBSON: The City acts as if all of these  
24 witnesses are a shock to them. Sloan Tamietti was listed in  
25 our initial disclosure statement. Once again, the City is

1 talking out of both sides of their mouth, Judge, because on  
2 the one hand they say, Well, John Vincent is harmless error  
3 because plaintiff knew he was a witness and he listed him. On  
4 the other hand, they say, Well, all of these witnesses were  
5 listed and now he's going to have a different circumstance  
6 under which he's going to testify. That makes no sense  
7 whatsoever. You can't have it both ways. Because what I  
8 noticed John Vincent for is not what the City is going to call  
9 him for.

10 THE COURT: All right.

11 MR. JACOBSON: And I'll remind you, Judge, that  
12 Sloan Tamietti was not covered under the meet and confer under  
13 Rule 7.2L. They never indicated that they would be filing a  
14 motion in limine regarding restricting or having Sloan  
15 Tamietti not testify. So they failed to meet and confer test.  
16 That suddenly they forget about.

17 THE COURT: So this morning we talked about  
18 depositions being taken of certain individuals.

19 MR. JACOBSON: Yes, Judge.

20 THE COURT: Who was that?

21 MR. JACOBSON: John Vincent.

22 MS. SAAVEDRA: John Vincent.

23 THE COURT: Was that all?

24 MR. JACOBSON: Yes.

25 THE COURT: All right. Well, I'll take a look at

1 this. So the government's -- the City's reurging the request  
2 to preclude or limit certain witnesses pursuant to your motion  
3 in limine No. 9. Is that which one it was?

4 MS. SAAVEDRA: Yes, your Honor.

5 I have a suggestion to the Court. Since neither  
6 party really briefed the issue of nondisclosure and what  
7 should be permitted based upon the extent of the disclosure  
8 that was done in this case, I would ask that we have leave to  
9 file supplemental briefs to address that issue.

10 THE COURT: And then set this for another hearing?

11 MS. SAAVEDRA: If the Court is inclined to do so, or  
12 you can rule based on the briefs and what's been presented  
13 today.

14 MR. JACOBSON: I think, Judge, we're -- we are two  
15 months out of trial. You have jury instructions due in less  
16 than a month. There's no way we're going to be able to get  
17 all of that briefed and argued, and depending on what you  
18 order depositions taken within -- within those two months. I  
19 can tell you, I'm out of the country for nine days in  
20 February. And I have several other out-of-town commitments.  
21 There's no way we're going to be able to get that done by  
22 April 1st.

23 THE COURT: Let me take a look at it and if I think  
24 it would be helpful, I'll direct the parties to file something  
25 very short simultaneously perhaps, because it wasn't raised in

1 more detail in the briefing. So I'll go ahead and think about  
2 whether that would be helpful for me to resolve the issue.

3 I would like the parties related to a questionnaire  
4 to get together and attempt to come up with a very short  
5 proposed questionnaire. I do think the government's little  
6 summary, I don't know if you -- I think the questionnaire is  
7 probably a good idea. I'm thinking of doing it the morning  
8 of, having very few questions, maybe no more than ten  
9 questions. I think the government's summary was pretty good.  
10 I don't know if you had a chance to look at it, Mr. Jacobson.

11 MR. JACOBSON: Judge, I'm comfortable with the  
12 summary that was in the joint pretrial statement that we  
13 worked through.

14 THE COURT: Well, I don't know if that's different.

15 MS. WATERS: I can tell you, your Honor, it is  
16 different. I provided a much shorter summary for the  
17 questionnaire than what is contained in the pretrial  
18 statement, though I did fundamentally model it off the  
19 pretrial statement.

20 THE COURT: Right. It looks like it's more user  
21 friendly. It's on page 2. I don't know if you want to look  
22 at it right now, Mr. Jacobson, or you can talk with opposing  
23 counsel later. But it's Exhibit 1, page 2, background of the  
24 case.

25 MR. JACOBSON: Judge, I apologize. I printed out --



1 I printed out all of the document but not the attachment. So  
2 I'll look at it and if it's -- if we can come to an agreement  
3 on that, we will.

4 THE COURT: Okay. And then I'm thinking just --  
5 this questionnaire would only be for the purpose of the  
6 breastfeeding and breastfeeding, breastfeeding in the  
7 workplace, those kinds of questions. Not questions about City  
8 hiring women to work as fire fighters. Do you work in an  
9 environment where more than 50 percent of your coworkers are  
10 women? Have you, your wife, decided not to have children to  
11 allow your wife to pursue a career.

12 And the lactation consultant one, I can cover that.  
13 I think you want to give them all a chance to talk. Right?  
14 You want to hear them talk about some things.

15 I think No. 16 is fine. Are you uncomfortable  
16 sitting on a jury that will involve testimony about  
17 breastfeeding and/or pumping breast milk.

18 So I'll ask them as a group about women working at  
19 the fire department. Women returning to work after having a  
20 baby, if you want me to ask if anybody is bothered by that.  
21 So if we could just limit it to the breastfeeding issue.

22 Would counsel anticipate if someone said no, I  
23 didn't breastfeed, would you want follow-up at sidebar? Why  
24 not? Or if they said, yes, I did breastfeed, would you want  
25 to know more detail or just that's the end?

1 MS. WATERS: I can imagine a situation where we  
2 would inquire, particularly in terms of needing to voir dire  
3 people who maybe wanted to breastfeed but were unable for some  
4 reason, that seems like an issue that is potentially relevant  
5 or an experience that might color a person's -- the way they  
6 view this particular case. So I don't know that there are --  
7 we would anticipate follow-up for every yes-or-no answer, but  
8 certainly at least for some people, follow-up is going to be  
9 necessary. And I don't think that can be managed with  
10 additional questions at the bottom. I think that's something  
11 we have to determine in the moment.

12 THE COURT: All right. So I'll let counsel -- how  
13 much time do you think you need? Because if you can't agree  
14 on that, then I'll go ahead and formulate a questionnaire and  
15 give it to you. Ten days? A week?

16 MR. JACOBSON: Ten days is fine.

17 MS. WATERS: That's fine, your Honor.

18 THE COURT: All right. So the minute entry will  
19 reflect within ten days of today's date -- let me give a  
20 specific date. That's always better. Today is the 4th. How  
21 about February 15th which is a week from Friday? Counsel will  
22 submit any proposed -- and if you have some questions you can  
23 agree on, let me know what those are.

24 And then we'll give these questionnaires to the  
25 panel that morning which leads me -- so the civil rules of

1 procedure talk about at least six, no more than twelve jurors  
2 in a civil case. Verdict has to be unanimous. I suggest, we  
3 have a two-week trial, that perhaps we have nine jurors and  
4 three are alternates. So in the event that we lose a juror,  
5 we have an extra three. But if we don't lose any of them, we  
6 let them all deliberate. Have the joy of deliberating as  
7 opposed to getting kicked off the case as an alternate after  
8 sitting on a trial for two weeks. To increase -- I don't know  
9 if that increases juror satisfaction. That way if they're all  
10 still, if all nine are still there, we could have them  
11 deliberate.

12 MS. WATERS: If they stick it out, they should get  
13 to deliberate. And the six and nine distinction still gives  
14 us a little room for error.

15 THE COURT: And if you want time to think about  
16 that.

17 MR. JACOBSON: I don't have a problem with nine,  
18 Judge. I just want to think about increasing that to twelve  
19 because that makes it theoretically harder to reach a  
20 consensus. And since it has to be unanimous, I don't want to  
21 prejudice my client by saying, Well, now we've got three more  
22 in there. I understand the fairness argument. I get it.  
23 But --

24 THE COURT: Or we could have -- we could just excuse  
25 one as an alternate and have eight. Or excuse two and have

1 one. There's all sorts of options.

2 And I think under the civil rules, federal, you each  
3 get three peremptory challenges, so it's going to be a  
4 smaller -- in civil cases -- criminal we usually call in 65  
5 jurors. So we're not going to need as many I don't think for  
6 this case. Any idea how many you think we might need based on  
7 your experience in trials or your colleague's experience.

8 MS. WATERS: I think it probably depends a little on  
9 how many we are aiming to end up with. Obviously if we're  
10 looking at twelve versus nine, then we were going to need a  
11 few more. So if we take the outside range and we assume  
12 twelve --

13 THE COURT: I'm not going -- I'm not --

14 MS. WATERS: Okay.

15 THE COURT: Six to twelve, I'm not going to go with  
16 the outer. I don't think we need that many jurors for this  
17 case. So assuming we went with the nine.

18 MS. WATERS: We're thinking of maybe a panel of 45  
19 to start with.

20 MR. JACOBSON: Yeah, the number I was banging around  
21 in my head was 50.

22 THE COURT: So we'll let the jury commissioner know.

23 So should we set another status conference? Do we  
24 have another one set before the trial, or do you want to just  
25 let me know if we need one?

1           MR. JACOBSON: We should probably set one after jury  
2 instructions are due.

3           THE COURT: Okay.

4           MR. JACOBSON: I would think. Let's do that and  
5 just discuss. And anything both sides can stipulate to, to  
6 make it go smoothly with the jury is encouraged.

7           I always talk to people about settlement. I think  
8 you had settlement discussions and you don't need the Court's  
9 assistance with that?

10          MR. JACOBSON: No, Judge. In fact as we indicated  
11 during the status conference, the City has refused to engage  
12 in settlement negotiations with us. And you indicated you  
13 weren't going to force us to talk.

14          THE COURT: Right. Okay. Just wanted to cover  
15 that.

16          So all right. So I'll take the remaining matters  
17 under advisement that we talked about earlier.

18          And if there's nothing further then we'll stand at  
19 recess at this time. Thank you.

20          MS. SAAVEDRA: Thank you, your Honor.

21          (Proceedings concluded at 3:13 p.m.)

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C E R T I F I C A T E

I, Cheryl L. Cummings, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 16th day of February, 2019.

/s/Cheryl L. Cummings

Cheryl L. Cummings, RDR-CRR-RMR-CRC-CRI  
Federal Official Court Reporter